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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CREIG LEE DILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals misconstrue the Jencks Act, 18 U.S.C. § 3500, by creating barriers to the production of documents which frustrate the Congress's intent in passing the Jencks Act and also the basic fair trial purposes which it was designed to serve? More specifically:

a) Does the Jencks Act require production of transcripts of a witness's earlier testimony containing verbatim statements relating to the subject matter of his direct testimony when these statements are in the possession, custody and/or control of the government, or does the Jencks Act instead have an implied "public records" exception justifying the concealment from the accused of such verbatim prior statements of the witness based on the theory that

they might be found by him in court files somewhere?

b) Can the Jencks Act be invoked only by a "ritual of words," incanting the name of the statute each time it is relied upon, or is it sufficient to use the essential language of the statute in a request reasonably calculated to draw the court's attention to the nature of the request?

2. When a police officer testifies for the prosecution as an expert on criminal behavior, basing his testimony on his prior investigations, and particularly when the prosecution admits he has testified in other trials concerning those investigations, do the Due Process Clause of the Fifth Amendment to the United States Constitution and the Compulsory Process and Confrontation Clauses of the Sixth Amendment require production, upon request, of the wit-

ness's testimony at the prior trials which relates to the subject matter of his present testimony, of reports of the other investigations upon which the witness bases his present testimony, and the manuals, guidelines and regulations pursuant to which those investigations were conducted?

3. Should the federal courts admit into evidence, in criminal trials, pseudo-expert testimony, purporting to describe how drug importers operate, but having no real relevance to any issue in the case, providing no basis for contrast with innocent behavior, and ultimately amounting to the government vouching for the strength of its own case?

4. Is a defendant who supplies lawful goods to the members of a conspiracy, with no showing of a long, continuous course of dealing, of instigation by him, of any stake in the venture on his

part, or of any knowledge of the nature of the conspiracy, entitled to an acquittal based on United States v. Falcone, 311 U.S. 205 (1940); Direct Sales Co. v. United States, 319 U.S. 703 (1943); and Ingram v. United States, 360 U.S. 672 (1959); in other words, are those cases, and recent cases from other circuits following them, still good law?

5. Should the conflict among the federal courts be resolved to require, upon request by the accused, jury instructions on the defendant's theory of the case, and particularized jury instructions tailored to the facts of the case, rather than abstract pattern instructions?

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IN THE

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October Term, 1982

CREIG LEE DILL,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Creig Lee Dill, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals* reported in 699 F.2d 18 (1st Cir. 1983), appears in the Appendix hereto (App. 1a). No opinion was rendered by the District Court pertaining to the issues herein.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on January 25, 1983. A timely petition for rehearing was denied on March 9, 1983 (App. 112a). Upon Petitioner's application, an extension of time to file this petition was granted to and including June 7, 1983. (App. 113a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

*The Court of Appeals consolidated the appeal of Creig Lee Dill with his co-defendants Hensel, Case, Duke, Hubbard, Standley and Wells. Hensel filed a petition for writ of certiorari on April 29, 1983, raising other issues. The petition was docketed as No. 82-1782 and was denied on May 31, 1983. The United States was the Appellee below.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The following provisions are set forth in pertinent part in the Appendix: U. S. Const. Amend V, due process clause; U. S. Const. Amend VI, compulsory process clause and confrontation clause; 18 U.S.C. § 3500 (The Jencks Act); Fed. R. Evid. 401; Fed. R. Evid. 402; Fed. R Evid. 403.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

On June 12, 1980, a one count indictment was returned in the United States District Court for the District of Maine, charging the Petitioner, Creig Lee Dill, along with co-defendants Hensel, Case, Downing, Duke, Hubbard, Storey, Standley and Wells with violation of 21 U.S.C. §§ 846 and 963. The indictment charged the defendants with conspiring to violate 21 U.S.C. §§ 841(a)

(1), 952 and 960 by conspiring to import and to possess with intent to distribute 18.7 tons of marijuana. The indictment alleged that, as part of the conspiracy, property at Turkey Cove, Tenants Harbor, Maine, was to be purchased for use as a landing site, that the vessel PATRICIA would be purchased and used to transport the marijuana, and that the vessel SUNSHINE would be acquired to assist the PATRICIA in navigating and "off-loading."

Petitioner Dill pled not guilty. Various pretrial motions were filed, including motions requesting Jencks material, material relating to expert witnesses or both. The government was ordered to produce all Jencks material five days prior to trial. Petitioner stood trial with all co-defendants except Downing, who had been severed. The trial began on April 29, 1981, after a week of suppression hearings.

Petitioner made all appropriate motions for judgment of acquittal but they were denied. He also timely requested the court to give three proposed charges to the jury relating to his theory of defense, based primarily on United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940). (The court had announced that it would consider the substance of charges submitted to it but would phrase the charge itself.) The court declined to give any of the proposed instructions and instead gave its regular, generalized jury charge.

The jury deliberated during three days. When it asked for additional instruction on conspiracy, the court read the original abstract charge in a somewhat summarized fashion. On May 15, 1981, the jury found all of the defendants guilty except Storey. Petitioner's

post-trial motions were denied.

On July 16, 1981, the court sentenced Petitioner to five years in prison and a fine of $10,000.00. Petitioner filed a timely Notice of Appeal on the same day.

The Court of Appeals affirmed the conviction on January 25, 1983 (App. 1a). Petitioner's timely petition for rehearing with suggestion for rehearing en banc was denied on March 9, 1983 (App. 112a).

(ii) Statement of Facts

Petitioner was "linked," as the Court of Appeals put it (App. 86a), by circumstantial evidence to a marijuana importation, possession and distribution scheme of his co-defendants at a waterfront lot in Turkey Cove, Tenant's Harbor, Maine. In April, 1980, Petitioner stayed at three different hotels in Maine, registered in his own name. He bought a 32-foot sport fishing boat,

SUNSHINE, in Hubbard's name, and paid for it with four checks. He had the standard radio and navigation equipment installed on it. Although Petitioner told the sellers he planned to take it to Massachusetts, it was later seen at Turkey Cove. Petitioner disappeared completely from the government's case after the boat appeared at the lot. When Hubbard was arrested more than a month later, he carried two slips of paper with Petitioner's name and phone number on them, among others; "Craig 300" was cryptically written in a notebook in the truck in which Hubbard was found. Significantly, no direct evidence exists that Petitioner knew the sports fishing boat he purchased would be used to assist any marijuana conspiracy or that he agreed to participate in any such conspiracy.

Over objection, DEA Special Agent

Michael Cunniff* testified, based on his training and experience investigating drug smuggling on the Maine coast, that drug smugglers in Maine typically had used, among other items, small "pilot" vessels as guide or communication vessels, and had communicated by radio.

Defendants had made several pretrial motions for discovery of Jencks material, material relating to expert witnesses, or both. The trial court had ordered the government to produce all Jencks material five days before trial. While Cunniff was still on the stand, Defendants moved for discovery of reports of the prior investigations about which he testified, along with DEA manuals and policies relating to them. The motion was denied, and a subpoena for the items was quashed.

The court refused to give the

*Cunniff was also the case agent, and testified for parts of four days about the investigation and the evidence against the defendants.

"theory of defense" instructions requested by Petitioner.

The jury deliberated during three days. They asked for additional instruction on conspiracy, and were read in summary fashion the same general abstract instructions that the court had originally given. All of the defendants but one were convicted.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ANSWER TWO IMPORTANT QUESTIONS OF THE SCOPE, LIMITS AND PROCEDURES OF THE JENCKS ACT: A. DOES IT REQUIRE PRODUCTION OF VERBATIM TRANSCRIPTS, IN THE POSSESSION OF THE GOVERNMENT, OF A WITNESS'S PRIOR TESTIMONY RELATING TO THE SUBJECT MATTER OF HIS TRIAL TESTIMONY, OR DOES IT CONTAIN A "PUBLIC RECORDS" EXCEPTION; AND B. WHETHER A REPEATED REQUEST FOR JENCKS MATERIAL IS SUFFICIENT IF IT CONTAINS THE ESSENTIAL WORDS OF THE STATUTE, OR MUST IT CONTAIN THE MAGIC WORD "JENCKS".

In a concurring opinion joined by Justice White, Justice Clark noted

that "the delineation of the limits of the Jencks Act has been peculiarly the province of this Court." Evola v. United States, 375 U.S. 32 (1963) (Clark, J., concurring in part and dissenting in part). Indeed, this Court has on many occasions granted certiorari to determine whether specific documents or kinds of statements were producible statements under the Jencks Act, or "to determine the scope and meaning" of the Jencks Act. Palermo v. United States, 360 U.S. 343, 346 (1959). See Lev v. United States, 358 U.S. 903 (1958), aff'd by an equally divided court, 360 U.S. 470 (1959) (whether "summaries and reports of prior statements made by witnesses to a government investigator" were producible under the Act); Clancy v. United States, 365 U.S. 312 (1961)(whether non-contemporaneous written memoranda of interviews, signed by the witnesses and relating to

the subject matter of their testimony, were Jencks statements); Simmons v. United States, 390 U.S. 377 (1968) (whether certain photographs were statements or parts of statements producible under the Act).

More recently, in Goldberg v. United States, 425 U.S. 94 (1976)(Brennan, J.), certiorari was granted to decide whether the Jencks Act contained an "attorney's work product" exception, and what procedure trial courts should follow in determining whether requested materials are producible statements. The Court said the case presented "important questions of construction and application of the Jencks Act . . . ." 425 U.S. at 96.

This case presents two equally important issues of the construction and application of the Jencks Act, and certain conflicts as well.

A. The Public Records Exception.

The Defendants made numerous pre-trial Jencks requests. The district court ordered the government to produce all Jencks material five days prior to trial. During the trial, Defendants moved for Jencks material and other reports and manuals relating to DEA Special Agent Cunniff's testimony. The request was denied and a subpoena for the documents was quashed. Thus, the government neither identified nor produced these prior statements and related materials -- not even to the trial court for in camera consideration.

In its brief to the court of appeals, the government for the first time let slip that "S/A Cunniff had personally testified before the judge presiding over this trial in virtually all those other cases [from which he drew his testimony about the modus operandi of drug smug-

glers resulting from his investigations of drug smuggling in Maine]." The First Circuit held that transcripts of the witness's prior testimony were not producible statements under the Jencks Act and that failure to produce them was harmless because they were part of the public record. (App. 99a-100a) The Court of Appeals refused to remand the case -- not even for an evidentiary hearing for the trial court to inspect these documents and determine the impact of their non-disclosure upon the trial. Hence, a host of transcripts, i.e., verbatim statements, reports and/or other materials relating to the expert testimony of the star witness against Petitioner exist but have never been made a part of the record in this case.

The court's creation of a public records or trial testimony exception to the Jencks Act, when the statements

requested fall clearly within the plain language of the Act, works a major repeal of the statute.

The First Circuit held that a witness's testimony at a prior trial is never a Jencks Act statement even though this verbatim statement may be in the possession, custody and control of prosecutors and its existence unknown to counsel for the accused.*

Thus, the Court of Appeals has, with no caselaw, statutory, or historical

*The Court of Appeals relied upon United States v. Baker, 358 F.2d 18 (7th Cir.), cert. denied, 385 U.S. 869 (1966), for that radical proposition. If that is the holding of Baker, then two circuits have effectively amended the Jencks Act and raised a very important question of federal law. In candor, we believe that the First Circuit misconstrued Baker. What Baker really stands for is that untranscribed court reporter's notes, in the possession of a court reporter, are not in the possession of the prosecutorial arm of the government, and thus the prosecutor has no duty to have them transcribed and to produce them, absent a pre-trial request. United States v. Lurz, 666 F.2d 69, 79 (4th Cir. 1981), cert. denied, 102 S.Ct. 1642 (1982). See also United States v. Munroe, 421 F.2d 644 (5th Cir. 1970) (apparently limiting Baker to its facts). That is not the problem

footnote continued . . .

authority, sua sponte created an exception to the Jencks act for verbatim transcripts of trial testimony and, presumably, for any statement which meets the plain language of the statute but is part of some public record.

The consequences for the administration of justice in the federal courts are staggering. Now the government is free to withhold transcripts of the testimony of government witnesses even though the prosecutor has the transcripts in hand and uses them to prepare for trial. Further, this decision places on defendants the insurmountable burden of combing all of the court files in 95 federal judicial districts, twelve

footnote continued from page 14:
posed here, because Defendants in the trial court made numerous pre-trial requests and because at least one of the cases cited by the government (we have no way of knowing how many more there may have been) involved an appeal, for which the testimony was more than likely transcribed. See United States v. Weber, 668 F.2d 552 (1st Cir.), cert. denied, 102 S.Ct. 2038 (1982).

circuits and an incredible number of state and local tribunals in the hope of finding prior statements of accusing witnesses. These never-ending searches will often have to be conducted by court appointed attorneys at government expense. Thus, the Court of Appeals has opened a tremendous drain on the finances of defendants and taxpayers. Moreover, it is needless to divert scarce resources to such a search since all the transcripts are already, by definition, in the possession, custody or control of the government and could be produced routinely. Finally, the decision works a practical repeal of the Jencks Act, and a defeat, for all practical purposes, of the accused's rights to basic materials for impeachment of witnesses and to a fair trial. See, e.g., Goldberg v. United States, 425 U.S. 94, 105, 107 (1976).

Nine times out of ten, neither pri-

vate nor appointed counsel will be able to find all the transcripts of prior testimony without help from the Jencks Act. Such an onerous task could never be completed by a defendant or his counsel prior to trial. But, since such transcripts do exist, they will often come to the attention of the accused after the trial. A flood of post-conviction proceedings will result.

Certiorari should be granted, as it was in Goldberg, to decide this important question of the construction and administration of the Jencks Act, and to prevent the imposition of this overwhelming burden on criminal defendants, the federal courts, and the taxpayers.

B. The "Ritual of Words" Requirement.

The Court of Appeals ruled that Petitioner "argued no . . . Jencks Act request to the court below, and [is] therefore barred from pursuing [that

claim] here." (App. 98a). This claim of waiver is not supported by the facts or the law and will not prevent this Court from reaching the public records exception issue any more than it kept the court below from pronouncing that exception. Indeed, the finding of a waiver is so outrageous that it presents another good reason for granting certiorari.

The Defendants had made numerous pretrial Jencks requests. The trial court had already ordered production of all Jencks material. Further, a portion of Petitioner's discovery request was phrased in the essential words of the Jencks Act: "portions of . . . report[s] that relate to the use of items such as he testified to." The opinion, therefore, can only mean that Petitioner's essential right to material under the Jencks Act can be defeated by his mere failure to incant the magic word "Jencks"

again in his final request.

This holding conflicts with long standing rulings of the District of Columbia and Second Circuits that no "ritual of words" is required to invoke the Jencks Act, so long as the request makes plain to the court what is requested. Howard v. United States, 278 F.2d 872 (D.C. Cir. 1960) ("May I see it?" sufficient); United States v. Aviles, 315 F.2d 185, 190-191 (2d Cir. 1963), vacated on other grounds, 375 U.S. 32 (1965) (court refused "to hold that such requests be couched in formal or technical language" or to require "the niceties of ancient common law pleading."). This was, until recently, the law in the First Circuit as well. See, e.g., United States v. Principe, 499 F.2d 1135, 1139 (1st Cir. 1974); United States v. Del Toro Soto, 676 F.2d 13, 17 (1st Cir. 1982) (remanding as to co-defendant who did not

raise a Jencks claim but whose case was "affected by" it).

Because it safeguards vital rights of confrontation and cross examination, the Jencks Act has long been liberally construed to effect its purpose. If that policy is to be reversed -- if "the niceties of ancient common law pleading" are to be imposed on it, then this important question of construction and application of the Jencks Act should be decided by this court.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT'S DECISION UPHOLDING THE TRIAL COURT'S DENIAL OF DISCOVERY CONFLICTS WITH HOLDINGS OF OTHER FEDERAL COURTS UNDER THE DUE PROCESS, COMPULSORY PROCESS AND CONFRONTATION CLAUSES OF OUR CONSTITUTION.

A. Due Process.

Assuming, arguendo, that the prior statements of the witness Cunniff and associated materials were not producible

under the Jencks Act, due process would require their production because they were manifestly relevant. United States v. Matfield, 4 M.J. 843 (ACMR 1978). The "constitutional overtones" of the decision in Jencks v. United States, 353 U.S. 657 (1957) have been mentioned frequently by Congress and the Court. See Palermo v. United States, 360 U.S. 343, 362-63 n.2 (1959)(Brennan, J., concurring). Cf. United States v. Valenzuela-Bernal, ___ U.S.___, 102 S. Ct. 3440, 3449 (1982) (Rehnquist, J.)(dicta that Jencks violation can be a due process violation as well). The compulsory process clause, the confrontation clause, the due process right to the fair administration of justice are all "close to the surface" of the Jencks case and the Jencks Act. Palermo, at 343; Campbell v. United States, 365 U.S. 85, 92 (1961)(Brennan, J.). In the present case, those considerations

tower above the surface.

Petitioner was denied access to statements by the government's star witness which related to testimony the Court of Appeals found substantial in determining his guilt. The government argued, and the court ruled, that the requested statements were not material (App. 94a, 96a, 97a). Yet, the court also ruled that Cunniff's testimony was relevant (App. 91a-93a). The requested items related directly to the subject matter of his testimony. If Cunniff's testimony was relevant to the government's case (and in fact a major point on which the panel relied in upholding the sufficiency of the evidence)(App. 87a), then statements related to that testimony, which were the only means of impeaching it, must have been relevant, material and essential to the cross-examination of the witness and/or prepa-

ration of the defense. The Jencks Act and its constitutional correlatives, if they mean anything, mean that the government must disclose this type of vital impeachment material.

How could the Petitioner confront Cunniff's 'this is the way marijuana smugglers behave' testimony? Only by examining and challenging the underlying investigations on which it was based. The fact that the court considered this testimony so significant emphasizes its importance to the case, and how essential it was to enable Petitioner to effectively cross-examine the agent on this point. If the prosecution wishes to protect such documents from discovery, it must keep its pseudo-experts off the witness stand. (See Point III below.) The prosecution cannot with impunity introduce such evidence, argue that it is relevant because it shows the defendant's connec-

tion to the conspiracy, rely on it in arguing that the evidence was sufficient to support the conviction, and then withhold the documents necessary to impeach the testimony because it is "not material" or is "burdensome." "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944)(L. Hand, J.).

B. The Right to Compulsory Process and to Confrontation.

The court's decision to uphold the district court's ruling that the discovery request should be quashed because it was "overly broad" and "burdensome"* is troubling for many reasons, not the least of which is that it conflicts with settled law in other circuits. Assuming,

*In the trial court, the government made no such contention, and offered no proof in support of such findings.

arguendo, that the request was burdensome, the proper remedy was to narrow the subpoena, not to quash it. The right to compulsory process may not be trampled merely for the sake of a discovery sanction. As the Fifth Circuit held in United States v. Goodwin, 625 F.2d 693, 704 (5th Cir. 1980), although the trial judge's decision to issue a subpoena is an exercise of his discretion, that discretion is subject to the constraints of the sixth amendment. Technical requirements such as timing and wording cannot outweigh this fundamental right.

Petitioner's concern here is not for a mere procedural technicality, but for the accused's fundamental constitutional right to confront and cross-examine the witnesses against him, see Davis v. Alaska, 415 U.S. 308 (1974), and to compulsory process. United States

v. Burr, 25 F.Cas. 187 (C.C.D.Va. 1807).* Petitioner is not seeking to impede the "determination of truth at trial" by suppressing evidence, cf. Stone v. Powell, 428 U.S. 465, 488-89 (1976)(Powell, J.). Rather, he seeks to carry out the search for truth. It is the prosecution which is attempting to withhold from the court, the accused and the jury relevant evidence which they need and which they have a right to examine. Such rights must not be lightly brushed aside, but must instead be carefully balanced against the government's asserted interest. Where the two conflict, the least restrictive alternative must be applied. See generally Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Indiana

*This case is like Burr, and not like United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982), because the petitioner has "never read the [requested material] and [is] unaware of its contents." 102 S.Ct. at 3449 n.8.

L. Rev. 711, 793-803 (1976). The court may not totally prohibit the defendant's exercise of his sixth amendment right where there is a less drastic way of preserving procedural requirements. Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972); United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981) ("[T]he compulsory process clause of the Sixth Amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants."); See also Ronson v. Commissioner of Corrections, 604 F.2d 176, 178-79 (2d Cir. 1979)(exclusion of insanity defense witness because of failure to give formal notice of intent to raise the defense violated sixth amendment; state's interest in restricting "truth gathering" must be "scrutinized closely"). Just as the sixth amendment forbids exclusion, sole-

ly as a discovery sanction, of otherwise admissible evidence offered by criminal defendants, so, too, it forbids the denial of compulsory process where necessary to effectively cross-examine a key government witness, solely as a sanction for seeking supposedly overbroad or belated discovery or failing to reiterate the magic word "Jencks." The court's decision thus conflicts with the Constitution and the Second and Fifth* Circuit cases cited above.

Most recently, over the dissent of Justices White, Brennan and Blackmun, this Court denied certiorari in a case presenting a similar issue. Taliaferro v. Maryland, No. 82-6483, 33 Crim. L. Rep. 4063 (May 23, 1983). This case is not burdened by the problems which may have troubled the court in Taliaferro.

*These Fifth Circuit cases are also the law in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc).

There, the trial court found the defendant was not diligent in locating the alibi witness whom he wished to call, but who had not been named in response to the prosecution's request for alibi witnesses. In the present case, petitioner was notified less than two weeks before trial that the government intended to offer the "expert" testimony of a DEA agent. The agent was not named. Petitioner promptly moved in limine to prevent the testimony. When that motion was denied, Petitioner moved for the discovery necessary to impeach him. Agent Cunniff was still on the stand giving his direct testimony at the time of the last discovery request.* Further, the Defendants had made several pretrial motions requesting discovery of Jencks material and material relating to any experts the government intended to

*Arguably, at least as to the Jencks material, a motion before that time could have been considered premature. 18 U.S.C. § 3500(b).

call, and had obtained an order requiring the prosecution to produce Jencks material five days prior to trial. Therefore, there is no diligence problem presented here. Nor in the present case did the Petitioner have any other means within his control for discovering the requested information. Cf. United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982). The issue is thus squarely presented here. Certiorari should be granted to resolve the conflict between the First Circuit and the Second, Fifth and Eleventh Circuits, and to prevent the trampling of these fundamental rights merely for the sake of a technical discovery sanction.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE FIRST CIRCUIT ON THE ONE HAND, AND THE SECOND, FIFTH, NINTH AND ELEVENTH CIRCUITS ON THE OTHER HAND, OVER WHETHER THE FEDERAL COURTS SHOULD PERMIT THE PROS-

ECUTION TO PUT ITS CASE AGENT ON THE STAND AS A PSEUDO-EXPERT TO VOUCH FOR ITS CASE.

The holding of the Court of Appeals that the pseudo-expert testimony of Agent Cunniff qualified as admissible under Rules 702 and 403, Fed. R. Evid. (App. 91a-93a), begs the most fundamental question preliminary to any determination under those rules: Was it relevant under Rules 401 and 402? Cunniff's testimony, as it related to Petitioner, was that, in his experience, drug smugglers used boats and radios to carry out their criminal purposes. Cunniff had no personal knowledge that Petitioner knew of the marijuana importation and distribution conspiracy, let alone that he intended to join it, when he provided a sports fishing boat to someone at Turkey Cove. Nor did Cunniff testify to any experience he had comparing the innocent use of sports fishing boats to the criminal use of

them, so as to permit a rational differentiation between the two. The trial court nonetheless ruled that the testimony was admissible, and the Court of Appeals affirmed. This holding places the First Circuit squarely in conflict with other circuits, but in accord with the reasoning which prevailed in the seventeenth century at witchcraft trials. According to this way of thinking, DEA Special Agent Cunniff was not the first expert witness to divine the peculiar ways of the fallen:

> There was also Dr. Brown of Norwich, a person of great knowledge; . . . and he was clearly of opinion, that the persons were bewitched; and said, That in Denmark there had been lately a great discovery of witches, who used the very same way of afflicting persons, by conveying pins into them, and crooked as these pins were, with needles and nails . . . .

A Trial of Witches at Bury St. Edmonds, 6 Howell's State Trials 687, 697 (1665).

The Fifth Circuit however, has held that similar testimony by a DEA agent did not pass that preliminary test of relevance. United States v. Hall, 653 F.2d 1002, 1006 (5th Cir. 1981).* There the agent

> testified as a kind of quasi-expert on DEA investigative procedures, and his testimony was limited to the general hypothetical descriptions of accepted practice that are typical of the expert witness. He testified to no facts bearing in any manner on the prosecution of Christopher Hall or on the investigation leading to that prosecution. His testimony had no tendency whatsoever to make the existence of any fact of consequence to the government's case in chief either more or less probable than it would have been without his testimony. See Fed. R. Evid. 401. Clearly, then, in the context of the government's case in chief, agent Donald's opinion testimony lacked substantial relevance to any matter in issue, and was, therefore, not admissible.

Similarly, Cunniff's testimony was of no assistance to the trier of fact

*This is also the law in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc).

because it "had no tendency to make the existence of any fact of consequence to the government's case . . . either more or less probable . . . ." The reason is simple: There was no comparison made between what drug smugglers described by Cunniff did, and what innocent people did. It was pseudo-science -- logically unsound but deceptive to a lay juror.

The fact that the testimony was overly persuasive, and thus highly prejudicial, is demonstrated by the panel's reliance on Cunniff's testimony in its determination of the sufficiency of the evidence. Such highly persuasive evidence could not have been harmless. As the court noted in Hall, "reduced to its essentials, [the agent's] testimony constituted little more than a (quasi-) expert commentary on the strength of the government's proof . . . . Such 'evi-

dence' has no place in a criminal trial." 653 F.2d at 1007. Accord, United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976), cert. denied, 429 U.S. 1045 (1977) (trial court properly excluded DEA agent's expert testimony about a common ploy used by narcotics smugglers to smuggle narcotics into the United States by planting them in secret compartments of suitcases provided to unwary travelers; no probative value of defendant's guilt); United States v. Stirling, 571 F.2d 708 (2d Cir.), cert. denied, 439 U.S. 824 (1978) (district court, in prosecution for mail fraud and conspiracy in sale of stock, correctly excluded testimony of state court judge that certain practices of corporation involved in defendant's scheme were "normal," "usual," or "proper.").

Allowing the admission of such testimony opens a door to serious abuse: The elevation of innocent behavior into

proof of guilt (even when there is an innocent explanation) based on the carelessly formulated and untested testimony of a pseudo-expert.* Cases allowing the admission of expert testimony to explain the use of jargon or the price of drugs, matters clearly beyond the ken of lay jurors, should not be expanded to permit the kind of hocus-pocus admitted here.

The court's decision may transform criminal trials. Whenever the government has a weak case, it will parade the case agent before the jurors to assure them that the accused behaved the way criminals do -- even though the agent has no experiential knowledge or logical basis

*This Court has recently expressed concern about similar speculation by law enforcement officers. A plurality held that evidence that a nervous young man paid cash for a one way ticket, carried American Tourister luggage, and traveled under an assumed name to New York, a so-called "target city," did not even rise to the level of probable cause for arrest. Florida v. Royer, ____ U.S. ___, 103 S.Ct. 1319 (1983) (White, J.).

to support the inference he asks the jury to draw. Already, the practice is spreading. See United States v. Payton, formerly reported in the advance sheet at 672 F.2d 1209 (D.C. Cir. 1982)(vacated and withdrawn on rehearing en banc); United States v. Thomas, 676 F.2d 531 (5th Cir. 1982); United States v. Johnson, 527 F.2d 1381, 1383 (D.C. Cir. 1976). The First Circuit should have stopped this perversion of criminal trials. Because it did not, the Supreme Court should resolve the conflict and decide this important point of federal law and practice.

In addition, the Court should appreciate that the speculative but spectacular nature of Cunniff's vouching testimony makes the discovery and disclosure issues of Points I and II above particularly well posed for review, and vice versa. The broadest possible lati-

tude should be given for the confrontation of controversial "experts" and their testimony should not be admitted without substantial discovery of the underlying data. See Advisory Committee's Note to Fed. R. Evid. 705.

IV.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE OPINION BELOW AND OTHERS LIKE IT AND THIS COURT'S DECISIONS IN UNITED STATES V. FALCONE, 311 U.S. 205 (1940), DIRECT SALES CO. V. UNITED STATES, 319 U.S. 703 (1943) AND INGRAM v. UNITED STATES, 360 U.S. 672 (1959).

A. The Opinion Conflicts with United States v. Falcone and its interpretation in Direct Sales Co. v. United States and with Decisions of the Second, Third, Fifth and Tenth Circuits Following Them.

Many years ago, Judge Learned Hand astutely observed that there is significant difference between a mere supplier of goods to an illegal conspiracy and a knowing, willful participant in the conspiracy.

> The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.

United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940). This Court attempted to clarify those distinctions in United States v. Falcone, 311 U.S. 205 (1940) and in Direct Sales Co. v. United States, 319 U.S. 703 (1943). The lower courts have been wrestling with the results ever since.

The courts of appeals, including the court below, are struggling to determine just what kind of, and how much, circumstantial evidence is sufficient to make out a crime in conspiracy cases. Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53

Colum. L. Rev. 228 (1953); United States v. Grunsfeld, 558 F.2d 1231 (6th Cir.), cert. denied, 434 U.S. 872 (1977) (rare, reasoned application of Falcone and Direct Sales); United States v. Rush, 666 F.2d 10 (2d Cir. 1981); United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir. 1983); United States v. Dumas, 688 F.2d 84 (10th Cir. 1982). It is time for this Court to revisit Falcone and Direct Sales, make clear to the lower courts that it shares Judge Hand's concern about drag-net prosecutions, and straighten the guidelines which have, over the last forty years, become at least blurred, if not broken.

The problem has recently become more acute with the growth of the illegal drug industry. If drug importers have use for boats and radios, they also have use for cars, trucks, real estate, homes, clothing, money, financial services, legal

services and groceries. Where is the line to be drawn?

A brief discussion of the Falcone and Direct Sales cases may be helpful. In Falcone, the defendants supplied sugar, cans and yeast to illegal distillers. The defendants' convictions for conspiring to operate the stills were reversed by the Second Circuit, and the reversals were upheld by this Court.

Three years later, in Direct Sales, the Court explained its Falcone decision and attempted to sharpen the line between a lawful supplier of goods and a knowing, willful conspirator. There, the defendant, a registered drug manufacturer and wholesaler, conducted a mail order business. Over a period of seven years, it sold tremendous quantities of a restricted narcotic, in large doses, to a physician practicing in a small town. The defendant company offered a discount

for quantity sales, it was warned by the Bureau of Narcotics that it was being used as a source of supply by convicted physicians, but continued the sales. Under all these circumstances, the Court affirmed the conviction for conspiracy to violate the narcotics statute. This Court distinguished Falcone on four grounds: (1) The continuous course of dealing over seven years, 319 U.S. at 712 n.8; (2) The restricted nature of the goods being sold, 319 U.S. at 713; (3) The stimulation and instigation involved in the offering of quantity discounts, 319 U.S. at 713; (4) The "stake in the venture" which, while perhaps not essential, is relevant, 319 U.S. at 713.

The facts before this court below differ from the facts of Direct Sales in the same way in which the facts of Falcone do. (1) There was no long and

continuous course of dealing; (2) The boat and the communications and navigation equipment were not restricted items, but were "articles of free commerce" like the sugar, cans and yeast in Falcone; (3) There was no evidence of any stimulation or instigation by Petitioner; (4) There was no showing of any "stake in the venture".*

The First Circuit's bare, unelaborated holding that Falcone was "inappropriate here" and its affirmance of the conviction on these facts thus squarely conflicts with this Court's interpretation of that case in Direct Sales Co. v. United States. It also conflicts with several cases from other circuits holding Falcone applicable on similar facts.

The facts of the present case most closely parallel United States v. Gerke,

*In fact, a work list and a payroll list were both found at Turkey Cove. Neither Petitioner's name, nor any name ever identified with him, were on either (App. 68a, 109a, 110a).

125 F.2d 243 (3d Cir.), cert. denied, 316 U.S. 667 (1942). There, the defendants bought a boat which was later used by others to import illicit alcohol. Many of the factors which the government argued against Petitioner were present in Gerke: the use of large amounts of cash in small denominations, the use of a name other than his own, the outfitting of the boat with special equipment suitable for the illegal purpose, the arguably misleading stories given to the people with whom he dealt. But this was not enough.

> It would justify a finding that Robin and Watson purchased the vessel having in mind its sale to others or even that at the time they made the purchase they had received part payment of the agreed purchase price from the ultimate purchasers. It might conceivably justify an inference that they knew of the business to which the purchasers intended to put it. But the finding that these defendants for profit sold a vessel to persons who they knew intended to and later did use it in an il-

> legal enterprise will not support their conviction for the offense with which they are charged . . . . For there is no evidence that they participated in the conspiracy or knew of its existence . . . . We accordingly think the rule of the Falcone case is applicable . . . .

125 F.2d at 246. Parenthetically, The case against Petitioner Dill was even weaker than the case in Gerke. The name he used was not a false name, but was the name of a real person, Hubbard, who may have been the actual purchaser. Unlike the defendant in Gerke, Petitioner did not visit the boat after the transaction, but in fact, completely left the scene.

These distinctions were recently reiterated by the Fifth Circuit in United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir.), rehearing denied, May 18, 1983. There, the court affirmed*

*That this issue is controversial is demonstrated by the dissent, 702 F.2d at 507-520.

the marijuana importation conspiracy conviction of a crew member on a boat which "reeked of marijuana," had no fishing equipment, and no cargo other than the contraband. But the court reversed his conviction for conspiracy to possess with intent to distribute marijuana, relying on the four points outlined above. 702 F.2d at 505-06. Accord, United States v. Dumas, 688 F.2d 84, 86 (10th Cir. 1982) ("defendant lacks the requisite criminal intent if he does not know the conspiracy's objective;" careful application of Direct Sales).

One of the cases relied on by the court in Dumas was United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970). There, the defendant supplied a gun to conspirators, who told him they would use it either to "pull the bank job" or to "pull something else." The Second Circuit held that defendant could not be

convicted of conspiring to rob a bank if he did not know that it was a bank that was to be robbed.

So much for the good news. It is ironic that the same court which decided Gallishaw recently held that Falcone is limited "to its strict facts." United States v. Rush, 666 F.2d 10, 11 (2d Cir. 1981).* The very idea of a lower federal court limiting a Supreme Court case to its facts should prompt certiorari. Worse, we have researched the literally hundreds of cases citing Falcone, Direct Sales or both, and are sad to report that these Supreme Court precedents are on their death beds. The courts have analyzed and applied them with varying degrees of candor and thoughtfulness, distinguished

*Two points must be made about Rush. First, it is far different from Petitioner's case, because the defendant in Rush conceded that he knew to what use the conspirators would put the money he loaned them. Second, a member of the Rush panel, Judge Timbers, sat on the panel below.

them away to mere shadows, or simply ignored them. See Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Colum. L. Rev. 228 (1953). Compare United States v. Federico, 658 F.2d 1337, 1343-44 (9th Cir. 1980)(evidence drug dealer said he was going to meet his supplier, met with defendant and a woman, and then delivered drugs, sufficient to uphold defendant's conspiracy conviction) with id. at 1344-1348 (dissenting opinion); and United States v. Alvarez, 610 F.2d 1250, 1256-57 (5th Cir. 1980)(reversing, with extensive discussion of Falcone and Direct Sales, drug conspiracy conviction of defendant who, while riding on a truck loaded with household appliances, nodded "yes" when asked if he planned to go to the unloading site) with United States v. Alvarez, 625 F.2d 1196 (5th Cir. 1980)(en banc), cert. denied, 451 U.S. 938 (1981)

(upholding Alvarez's conviction on rehearing, with no discussion of Falcone or Direct Sales); and United States v. Molovinsky, 688 F.2d 243, 246-47 (4th Cir. 1982) with 688 F.2d at 249-50 (dissenting opinion).

The Court in Gallishaw pointed out that the distinction is "one of the fine points in the law of conspiracy." 428 F.2d at 762. Either the First Circuit has missed it, or it has overruled Falcone and Direct Sales. In any event, the opinion below fairly represents the majority attitude which is to act as if these cases are dead.

Certiorari should be granted because major Supreme Court precedents construing a major and dangerous doctrine of extended criminal liability are being applied in highly conflicting ways. A few cases have remained faithful to the principles announced in those cases. The

vast majority have limited these Supreme Court precedents to their facts, either expressly or by indirection or by just plain ignoring them. If Falcone and Direct Sales are bad law, this Court should say so. If they are good law, this Court should say so and enforce them. This is the case for it because the facts herein pose the questions so clearly and powerfully.

B. The Conflict with Ingram v. United States, United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir. 1983) and United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970).

The opinion below also wreaks havoc with Ingram v. United States, 360 U.S. 672 (1959). Ingram requires that, for a conspiracy conviction to stand, the government must prove that the defendant possessed "at least the degree of criminal intent necessary for the substantive offense itself." 360 U.S. at 678 (empha-

sis in original). In Ingram, the evidence showed that the defendants engaged with numerous others in a closely organized, large-scale numbers game, illegal under Georgia law, but not violative of any Federal statute. The "entrepreneurs" of the business did not pay the required federal taxes on their ill-gotten gains. The convictions, on tax conspiracy charges, of the defendants who were not entrepreneurs and who did not owe any federal taxes were reversed by the Supreme Court. This Court held that, while there may have been sufficient evidence to convict them of a conspiracy to violate Georgia law, that was not the charge against them. It was simply no more likely that they conspired to violate the federal tax laws than that they merely conspired to violate the Georgia laws. The government there, as did the government below, noted the

secrecy and furtiveness of the operations.

> Yet these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes. Certainly the secrecy of the operation did not go to show that knowledge.

360 U.S. at 679. By affirming Petitioner's conviction on the evidence adduced below, the court sanctioned the jury's inference of Petitioner's knowledge of the conspiracy and its purpose from the "secrecy of the operation."* The court required no proof of specific knowledge, and expressly approved generalized instructions which omitted this

*This Court recently recognized that facts showing similar furtiveness (the use of a false name, paying cash for tickets to a target city, and nervousness) did not even rise to the level of probable cause to arrest the accused on narcotics charges. Florida v. Royer, ___ U.S. ___, 103 S.Ct. 1319 (1983)(plurality opinion by White, J.). Here, as in the pre-arrest circumstances of Royer, there was nothing to show why the Petitioner was using a false name and paying cash for his purchases. There was nothing to show that he knew the people for whom he bought the boat were planning to import marijuana.

requirement (App. 89a-90a). It stated the requirement as "knowlege of the unlawful character of the plan" (App. 90a), with no requirement that the defendant have any knowledge of the nature of the planned violation.

The Fifth Circuit has recently demonstrated much more sensitivity to the problem of the kind of circumstantial evidence from which knowledge of the nature of the conspiracy may be inferred, but it, too, is having difficulty in drawing the line. See United States v. Michelena-Orovio, 702 F.2d 496 (5th Cir.), rehearing denied, May 18, 1983. The court reversed the conspiracy conviction of a crew member who knew marijuana was aboard the boat, who agreed to import it illegally and who participated in the scheme to import it, because the government failed to prove he had the intent to join a scheme to possess it with intent

to distribute it in the United States. In contrast, the court below affirmed the conspiracy to import and possess with intent to distribute conviction of a boat seller who supplied a boat which was never intended to contain marijuana, despite the fact that the government never proved that the petitioner knew of, let alone intended to join, any agreement involving marijuana. The two decisions exemplify the conflicting approaches to analyzing circumstantial evidence in conspiracy cases.

In its failure to apply Ingram to these facts, the First Circuit's decision below also conflicts with United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970) (defendant could only be convicted of conspiracy to rob a bank if he knew the gun he provided would be used to rob a bank). There the court reaffirmed the principle, totally disregarded

by the First Circuit below, that "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." 428 F.2d at 763. The opinion below pointed to no evidence that petitioner knew there was a marijuana conspiracy, or even a drug conspiracy (App. 86a-88a). While the court pointed to evidence supporting the inference that petitioner was being secretive with respect to the purchase of the boat, it never discussed how, if at all, that evidence showed that he knew the boat was to be used somehow in a marijuana importation, and possession conspiracy.*

*Incidentally, in affirming Petitioner's conspiracy conviction, the court found it necessary to rely on evidence of his activities prior to the inception of the conspiracy with which he was charged. This violates due process and the principles enunciated by the Court in Dunn v United States, 442 U.S. 100 (1979); Eaton v. City of Tulsa, 415 U.S. 697 (1974); and Presnell v. Georgia, 439 U.S. 14

footnote continued . . .

The First Circuit is thus in conflict with the Second Circuit on how and when to apply the rule of Ingram, "one of the fine points in the law of conspiracy." 428 F.2d at 762.

If Ingram was not ignored, then it, like Falcone and Direct Sales, was overruled. This is not a problem that is going to go away. The government has expanded its drag-net sweep in drug cases to reach for brokers, lawyers, financiers and banks. See, e.g., Beck, A New Attack on Drugs, Newsweek, July 20, 1981 at 30-31. This Court should make clear now what law should be applied in such cases. Moreover, if three major decisions of the Supreme Court are to be overruled, then such action should not be taken lightly, and it should be the Supreme Court that

footnote continued from page 55:
(1978). We will elaborate this defect in our discussion of the sufficiency of the evidence in our brief on the merits, if certiorari is granted. In any event, this pre-conspiratorial evidence proves neither specific intent nor knowledge.

does it. As things now stand, the rule of law is in trouble.

V.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A SERIOUS CONFLICT AMONG THE CIRCUITS ON WHETHER A GENERAL, ABSTRACT, EVEN IF LEGALLY CORRECT, JURY INSTRUCTION IS AN ADEQUATE SUBSTITUTE FOR SPECIFIC INSTRUCTIONS TAILORED TO THE FACTS OF THE CASE AND SPECIFIC INSTRUCTIONS SETTING OUT THE DEFENDANT'S THEORY OF THE CASE.

Petitioner furtively supplied a boat to persons who might have intended to use it as a pilot boat to assist in a single unconsummated marijuana importation. Thus, he was caught in a classic Falcone situation. United States v. Falcone, 311 U.S. 205 (1940). The Court's approval of generalized pattern jury instructions, despite Petitioner's request for more specific instructions on his theory of the case, violates two well-settled legal doctrines which have recently been the subject of conflicting decisions in several circuits.

First, a defendant is entitled to have special instructions given to the jury telling it about his theory of the defense. This used to be the law in the First Circuit, e.g., United States v. Leach, 427 F.2d 1107, 1112 (1st Cir.), cert. denied, 400 U.S. 829 (1970); Golden v. United States, 318 F.2d 357 (1st Cir. 1963); Greenberg v. United States, 295 F.2d 903, 970 (1st Cir. 1961), and remains the law in six other circuits. E.g., United States v. Alfonso-Perez, 535 F.2d 1362, 1365 (2d Cir. 1976); United States v. West, 666 F.2d 16, 20 (2d Cir. 1981)*; Strauss v. United States, 376 F.2d 416 (5th Cir. 1967); United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir.

*It is ironic that Judge Timbers, a member of the panel below, sitting by designation, wrote the opinion in West and reached a different conclusion there, applying the law of the Second Circuit, than he reached below, applying the law of the First Circuit. Certiorari should be granted simply because "a defendant's rights would be notably different depending upon the Circuit in which he is tried." Masri v. United States, 434 U.S. 907 (1977) (White, J., dissenting from denial of certiorari).

1979)("defendant is entitled to a charge which precisely and specifically, rather than generally or abstractly, points to the theory of his defense)*; United States v. Shackleford, 677 F.2d 422, 425-426 (5th Cir. 1982)("Charging the jury that a finding of specific intent to convert is required for conviction, while it may generally constitute the negative instruction (i.e., that if the defendant acted in good faith he could not have had the intent and knowledge required to convict him) does not sufficiently direct the jury's attention to the defense of abandonment"); United States v. Carroll, 518 F.2d 187 (6th Cir. 1975) (fact that court read the statute to the jury and defined its terms insufficient); United States v. Vole, 435 F.2d 774, 776-77 (7th Cir. 1970) ("the defendant in a criminal

*These Fifth Circuit decisions handed down before the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit as well. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

case is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous:"; instruction must specifically bring defense to the attention of the jury); United States v. Prieskorn, 658 F. 2d 631, 636 (8th Cir. 1981) (the court found the instructions given to be correct, but reversed for failure to give a properly requested instruction on defendant's theory of defense).

The decision below, however, aligns the First Circuit with the holdings of the Fourth and Tenth Circuits in two very recent cases, that an abstract, general instruction is sufficient even if the defendant properly requests instructions on his theory of defense. United States v. Head, 697 F.2d 1200 (4th Cir. 1983); United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983).

Thus, the First, Fourth and Tenth Circuits are in direct conflict with the Second, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits. This significant conflict should be resolved by this Court.

Second, a defendant is entitled to have instructions given to the jury tying the law to the facts of the particular case. "A judge has a duty to give instructions that are meaningful and translated, not in terms of mere abstract law, but into facts of the particular case." United States v. Piccolo, 696 F.2d 1162, 1170 (6th Cir. 1983); Choy v. Bouchelle, 436 F.2d 319, 325 (2d Cir. 1970) (failure to give instructions relating law to relevant facts in complex contract case constitutes plain error even though instructions given set forth the law in abstract fashion). The Fifth Circuit has "repeatedly held that 'a

Defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense' . . ." United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979) and cases cited therein. This used to be the law in the First Circuit, see Greenberg v. United States, 295 F.2d 903 (1st Cir. 1961), and case cited therein. By abandoning this sound and basic principle, the First Circuit has again placed itself in conflict with the Second, Fifth, Sixth and Eleventh Circuits.

The case at hand called out for adherence to these doctrines. Petitioner's conduct was in a gray area of the law not addressed by the black and white pattern instructions given to the jury.* Instruction on this "fine point

*Thirty years ago, one commentator noted that "jurors are left with little more than intuition in dealing with the difficult problem of the seller or purchaser. It is here that the

footnote continued . . .

of the law of conspiracy" was essential. United States v. Gallishaw, 428 F.2d 760, 762 (2d Cir. 1970).

The court's conclusory pronouncement that requested instructions based on Falcone "were inappropriate here" (App. 91a) is startling, to say the least. (See Point IV. above.) If Falcone is not applicable here, it is not applicable anywhere, and the First Circuit has, sub silentio, overruled it.

The First Circuit has held that neither the accused nor the jury have a right to particularized jury instructions if generalized instructions cover the essential elements of the crime (App. 89a-90a). This is a radical notion which impairs the right to trial by jury, changes established jury trial practice

footnote continued from page 62:
greatest need for improvement lies. Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Colum. L. Rev. 228 (1953). There is still a crying need for guidance here. This Court should provide it.

and destabilizes a substantial body of precedent. It is a source of growing conflict among the circuits. It is worthy of Supreme Court attention.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CREIG LEE DILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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and
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APPENDIX

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APPEALS FROM THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

[(Hon. Edward T. Gignoux,

U.S. District Judge)]

Before

Timbers,* Senior Circuit Judge,

Campbell and Breyer, Circuit Judges.

Michael Avery, with whom John P. Ward was on brief, for appellant David Keith Hensel.

Edward T.M. Garland, with whom Steven H. Sadow, and Garland, Nuckolls & Catts, P.C. were on brief, for appellants Larry Ronald Duke and Robert Curtis Hubbard.

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* Of the Second Circuit, sitting by designation.

David C. Pomeroy, with whom Wheeler, Pomeroy & Snitger was on brief, for appellant Charles Thad Standley.

Bruce H. Morris, with whom Devine & Morris, and Melvin Gutterman were on brief, for appellant Gerald Wayne Case.

Mark J. Kadish, with whom Rosalyn S.Kadish, and Kadish, Davis & Brofman, P.C. were on brief, for appellant John Jacob Wells.

Joseph Beeler, with whom Barbara Green was on brief, for appellant Creig Lee Dill.

Margaret D. McGaughey, Assistant United States Attorney, with whom Richard S. Cohen, United States Attorney, was on brief, for appellee.

Breyer, Circuit Judge.

We here consider appeals from several defendants convicted by jury trial of participating in a conspiracy to import and distribute marijuana. Rather than write seperate opinions in these several cases, we here consolidate them and treat all the appellants' claims in one opinion. We first set forth the facts upon which many of the defandants' claims depend. Our description is based primarily upon that of the Maine federal district court found in 509 F. Supp. 1364 and 509 F. Supp. 1376. We then consider the claims that raise the most difficult legal issues--those of defendant Hensel- and we follow that analysis with a consideration of the claims of the other defendants. We affirm all of the convictions.

I

The Facts

On the morning of May 31, 1980, after a 24-hour chase on the high seas, a Canadian vessel stopped a 65-foot Honduran shrimp boat 65 miles southeast of Nova Scotia. On board the ship the police agents found defandant Hensel, a crew of eight Colombians, and 18.7 tons of marijuana. Three days later Maine state police and federal Drug Enforcement Administraion (DEA) agents raided the secluded cove on the coast of Maine where Hensel was to have delivered his cargo. They arrested several of the defendants and gathered the evidence at issue. We shall seperately describe the events at sea and on land.

A

At Sea

On May 28, 1980, a local fishing vessel, the J. BRADLEY O'HARA, spotted an unfamilar ship 90 miles southeast of Rockland, Maine. The ship, the M/V PATRICIA, did not seem to be engaged in fishing. Two days later, the PATRICIA approached the O'HARA and Hensel, captain of the PATRICIA, asked permission to use the O'HARA's radio to contact a "partner." Hensel explained that his ship's radio batteries were dead and that its generator did not work. The crew of the O'HARA assured Hensel that he could use the radio after they had hauled in their fishing nets. During that time, however, the O'HARA's captain became suspicious and sent the Coast Guard a message that the PATRICIA was disabled. When the PATRICIA again

approached the O'HARA, the captain told Hensel that he had contacted the Coast Guard, and he refused to let Hensel use his radio. "I told him that we knew what he was up to," the mate of the O'HARA testified, "and we didn't want any part of it." Hensel asked that the call be cancelled, but the Coast Guard had already dispatched aid. Hensel then asked the mate of the O'HARA to place three telephone calls. The O'HARA however, simply relayed the numbers to the Coast Guard.

The Coast Guard sent at least one plane and the cutter RELIANCE to the scene. The plane piloted by Lt. Luginbuhl arrived at about 11:25 and found the PATRICIA lying dead in the water and flying no flag. Lt. Luginbuhl tried unsuccessfully to communicate with the PATRICIA by radio. After he had made

several low passes over the ship, the PATRICIA got underway and began sailing toward the northeast.

Lt. Luginbuhl asked the El Paso Information Center computer to check the status of the PATRICIA and found that a ship named the PATRICIA (later discovered to be a different ship) was suspected of smuggling drugs. The Coast Guard ordered the lieutenant to follow the PATRICIA until the RELIANCE arrived; it also notified Agent Drinan of the DEA in Maine and the Canadian Coast Guard of the situtation.

Lt. Luginbuhl continued to track the PATRICIA as it headed toward Nova Scotia in the northeast. After further unsuccessful efforts to communicate with the ship, he dropped a message block ordering the PATRICIA to turn around so that officers of the RELIANCE

could board the ship. The PATRICA, however, maintained its course. By 3:00 p.m., a Canadain Coast Guard arrived and at the request U.S. Coast Guard relieved Lt. Luginbuhl. This plane, too, tried to communicate with the PATRICIA by message block, and it tried to divert the ship from its course by using smoke floats. Nevertheless, the PATRICIA continued toward Nova Scotia. After about four hours, a U.S. Coast Guard plane resumed tracking the PATRICIA, but it was no more able than its predecessors to communicate with the PATRICIA or to turn it from its course.

By 7:00 p.m. it became clear that the PATRICIA would escape into Canadian waters before the RELIANCE could intercept it. The Candaian authorities accordingly began their preparation to intercept the PATRICIA,

and they dispatched their ship LOUISBOURG. They told the DEA they would board the PATRICIA if it came within Canadian waters, and Agent Drinan encouraged them to do so.

Meanwhile, the DEA discovered that two of the telephone numbers Hensel had asked the O'HARA to call were listed in the names of Florida men suspected of drug crimes. When Agent Drincan learned that the third number was for a Georgia exchange, he told the Coast Guard that the DEA had°been monitoring a suspected drug ring on tje]aine°cocst which used Georgia and Florida vehicles. American agents maintained contact with the Canadians throughout the night.

By 5:11 a.m. the Canadian ship LOUISBOURG was within sight of the PATRICIA, and by 6:00 a.m. the American Ship REIANCE had arrived. Both ships

tried to communicate with the PATRICIA, using not only radio but flag hoists, a loud hailer, and flashing lights, but neither ship succeeded. The PATRICIA appeared badly rusted and was riding below its waterline. It displayed no nets or fishing gear and apparently contained substantial electronic equipment. Although it had the name PATRICIA on the bridgewing, it showed no homeport and no identification numbers on the hull. It had, by this time, hoisted a Honduran flag.

The RELIANCE notified the LOUISBOURG that since the PATRICIA was a Honduran ship, the RELIANCE officers could not board it without first obtaining the permission of the State Department and the government of Honduras--a process it expected to take 24 to 48 hours. The Canadians, however, believed

that they could board the PATRICIA as soon as it came within 21 miles of the Canadian coast. Soon after 9:00 a.m. they told the RELIANCE that, if the RELIANCE did not act, they would. The RELIANCE in turn agreed to let the Canadians land a helicopter on board it if necessary, assured them that it would protect the LOUISBOURG, and apparently manned its fifty-caliber machine gun.

The Canadians swung the LOUISBOURG around the PATRICIA at high speed in an attempt to stop it with its wake. When that failed, they fired a 12-gauge shotgun across the PATRICIA's bow. The sailors aboard the PATRICIA ducked, and the Canadians then aimed at the wheelhouse where three or four men apparently stood. The Canadians blasted the wheelhouse twice, and the PATRICIA came to a halt.

Three armed Canadian agents boarded the PATRICIA and ordered the crew of eight Colombians and defendant Hensel to the stern of the boat. They loosened the bolts on two closed hatches at the bow of the ship and found over 600 burlap bags containing 18.7 tons of marijuana. They arrested Hensel and the Colombians and, because the Colombians spoke no English, used interpreters from the RELIANCE. One of the officers of the RELIANCE then boarded the PATRICIA to check the documentation of the vessel and to inspect its equipment, as well as to ascertain the identities of those arrested. The Canadians towed the ship to Nova Scotia where they unloaded it and stored the cargo.

After originally telling the Canadians that he was from Connecticut and that his ship was headed for Africa,

Hensel admitted that his true address was in Florida, that the ship was indeed headed for the United States, and that he was to have earned $ 400,000 from the delivery. The Canadian officials eventually decided not to prosecute Hensel and on June 3 expelled him from the country. Hensel was flown to Boston, where Agent Drinan met him at the airport. Hensel called an attorney, and Agent Drinan then arrested Hensel. Hensel appeared before a magistrate and was charged with conspiracy to import marijuana.

B

On Land

The investigation into the activities on the Maine coast had begun about a month before the PATRICIA arrived. In late April 1980 agents of the DEA and the Maine state police learned that Lot No. 3 of the Turkey Cove subdi-

vision in Tenant's Harbor, Maine, had been bought in the name of the defendant Duke's father for $ 170,000 in cash. The lot contained just under three acres of relatively secluded land on the Maine coast. On it stood three wood-frame buildings, a wooden garage, and a deep-water dock that gave the residents access to the Atlantic Ocean. A short driveway connected the buildings to a subdivision dirt road, which in turn led to Glenmere Road, a public highway.

The agent also learned that in late April defendant Dill had bought a 32-foot sport-fishing boat, SUNSHINE, in defendant Hubbard's name, and had paid for it with four checks totalling 30,000.00. Dill had installed in the boat $8,000 worth of electronic equipment. Although Dill and an accomplice told the sellers of the boat that they

planned to take it to Massachusetts, agents later saw it at the Turkey Cove lot. Dill, the agents also discovered, had been convicted in 1974 in Venezuelza (and sentenced to four years in prison) for possessing 2-1/2 kilograms of cocaine.

On the basis of this information the DEA and the Maine police set up a surveillance program to monitor activity at the Turkey Cove property. Agent Drinan of the DEA and Sgt. Bailey of the Maine police coordinated the operation. They established posts on adjacent properties as well as across the St. George River, and two or three times a week they conducted aerial surveillance. During the day they used a telescope, a spotting scope, and binoculars to monitor the property, and at night they used a nonmagnifying nightscope. The agents

could see people and vehicles on Lot No. 3, but they were unable to observe activities inside any of the buildings.

During May the agents watched the SUNSHINE sail out to sea many times. The boat generally left in the afternoon and returned late at night, often without navigational lights. The agents also saw several vehicles on the property, including eight out-of-state, large-capacity, cargo vans. Near the end of May they observed people strengthening the dock, and they noticed that some of this work was being done at night by flashlight.

At about 11:30 p.m. on June 2 a state policeman at the observation post across the river saw the SUNSHINE return to Turkey Cove accompanied by a sixty- to seventy-foot boat. Although the agents later learned that the SUNSHINE had run aground and was merely being

towed home, they initially suspected that this larger boat might be the narcotics boat for which they had been waiting. Accordingly, Agent Cunniff of the DEA and Cpl. Sinclair of the Maine police went to scout the Turkey Cove property. At about 12:30 a.m. they made their way down the subdivision access road and walked to the beach through the woods on the land adjacent to Lot No. 3. They then followed the beach toward Lot No. 3 until they reached a spot where debris blocked their way. Cpl. Sinclair waded through waist-high water around the debris in order to approach the dock. Agent Cunniff waited some minutes and then joined Cpl. Sinclair. Although several people boarded the larger boat, no one unloaded it, and at about 3:00 a.m. the larger boat left.

Having discovered that the boat was not delivering drugs, Agent Cunniff and Cpl. Sinclair decided to leave Turkey Cove. Rather than return through the deep water, however, they chose to take what they said they thought was the most direct route back to Glenmere Road--a route through Lot No. 3. As they walked along the Lot No. 3 driveway, they passed a tan jeep and recorded its license number.

Through a check of the license number, the agents discovered later that night thet the jeep was owned by defendant Wells. Agent Drinan then obtained Wells' telephone number and found that the third phone number Hensel had given to the O'HARA had been Wells' number--with two digits transposed. At this point, the connection between the PATRICIA and the Turkey Cove property

became clear. Moreover, at about 4:30 the next afternoon the agents monitoring Turkey Cove learned that Hensel had been deported from Canada and arrested at Boston's Logan airport. More critically, however, they learned that Hensel had telephoned an attorney in Boston and told him to call a woman who "would know who to call and know what to do." Worried that Hensel's acquaintance would have relayed the news of the PATRICIA to those at Turkey Cove, the agents decided to survey the property more closely and, if appropriate, to make arrests.

At about 7:15 p.m., Agent Cunniff saw the tan jeep turn off the access road at Turkey Cove onto Glenmere Road. He followed the jeep and signalled it to stop. Defendant Case climed out of the jeep and asked if something was wrong. Agent Cunniff identified himself

as a narcotics agent and, when he saw defendant Hubbard crouched in his seat in the jeep, opened the door and asked Hubbard to step out. As Agent Cunniff did so he found a CB radio with a 12-volt battery and an antenna. Two state policemen had arrived by this time, and the agents put the defendants under arrest.

Agent Cunniff and Cpl. Bailey feared, however, that Hubbard might have used the CB radio in the jeep to alert the men at Turkey Cove. To prevent those present from escaping or destroying evidence, the police decided to raid Lot No. 3. They arrested defendant Standley by the boathouse and found defendant Duke sitting at a desk in the main house. Duke was writing on sheets of paper, later entered into evidence as Government Exhibit 111, and a yellow pad, Government

Exhibit 110, lay nearby. The agents found $2,000 in cash on Duke's desk and $44,000 in an open briefcase. Agent Cunniff arrested Duke; defendants Dill and Wells apparently were arrested later.

The seven appellants, together with two other defendants, were indicated by a grand jury on June 12, 1980, and charged with conspiracy to posses with intent to distribute and to import into the United States approximately 18.7 tons of marijuana, in violation of 21 U.S.C. §§ 846 & 963. Eight of the defendants were tried together before a jury with Chief Judge Gignoux, of the U.S. District Court for the District of Maine, presiding. On May 15, 1981, the jury found the seven appellants guilty as charged and acquitted an eighth defendant, William Storey. We previously considered a

government appeal from a suppression order concerning the ninth defendant, John Downing, in United States v. Downing, 665 F.2d 404 (1st Cir. 1981). The lower court's decision on several of the evidentiary issues involved in the appeal at bar can be found at United States v. Hensel, 509 F. Supp. (D. Me. 1981) and United States v. Hensel, 509 F. Supp. 1376 (D. Me. 1981).

II

Hensel's Suppression Claim

We first consider defendant Hensel's suppression claim. He argues that the federal government obtained evidence from the PATRICIA in violation of his Fourth Amendment rights and that the "exclusionary rule" therefore required the district court to suppress all evidence obtained through that seizure. See Weeks v. United States, 232 U.S. 383

(1914). We recognize that the exclusionary rule" applies to searches by American agents on the high seas. See United States v. Green, 671 F.2d 46, 53 (1st Cir.), cert. denied, 131 (1st Cir.), cert denied, 449 U.S. 887 (1980); United States v. Miller, 589 F.2d 1117, 1125-26 (1st Cir. 1978), cert. denied, 440 U. S. 958 (1979); see also Note, High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea, 93 Harv. L. Rev. 725, 726 & n.9 (1980) [hereinafter cited as Harv. Note]. We are also willing to assume the search violated Canadian law. Even so, however, we believe that the "exclusionary rule" does not authorize suppression here.

We shall analyze Hensel's argument by examining three separate questions. First, is the "exclusionary rule" inapplicable because of the fact

that the Canadians, not the Americans, searched the ship? Second, if the exclusionary rule is applicable despite the actions of the Canadians, did the search violate Hensel's constitutionally protected right of privacy? Third, if not, is suppression nonetheless required because the search was unauthorized by statute or Coast Guard regulations?

1. We first consider whether the "exclsusionary rule" does not apply to this search because it was conducted by Canadians. As the government points out, the "exclusionary rule" does not require the suppression of evidence seized by foreign police agents, for the actions of an American court are unlikely to influence the conduct of foreign police. See United States v. Rose, 570 F.2d 1358, 1361-62 (9th Cir. 1978); United States v. Morrow, 537 F.2d 120,

139 (5th Cir. 1976), cert. denied sub nom. Martin v. United States, 430 U.S. 956 (1977). This principle does not dispose of the case, however, for there are two well-established exceptions to this rule: (1) where foreign police conduct "shock[s] the judicial conscience," id. at 139 and (2) where American agents "participated in the foreign search, or . . . [the foreign officers acted] as agents for their American counterparts . . . . " Id. The district court held that the second exception applies here.

The issue is one of applying a legal label to a complex set of facts, some of which suggest significant American involvement while others suggest the contrary. On the one hand, as the district court noted, the Americans began the search, the Americans asked the

Canadians to join in the effort, an American DEA agent urged the Canadians to join in the effort, it entered Canadian waters, the RELIANCE (an American ship) showed firepower and provided back-up assistance during the Canadians' boarding, the RELIANCE provided interpreters after the boarding, and an American officer participated in a second search of the PATRICIA. These factors suggest an American-Canadian "joint venture."

On the other hand, the Canadians controlled the search of the PATRICIA, they were searching for evidence of violations of Canadian law, they intended to prosecute Hensel for Canadian crimes, the initial boarding party consisted only of Canadians, the Canadians retained control of all the evidence for some time after its seizure, and American agents may have told the

Canadians to make their boarding decision independently. As the district court noted, the question is a "close" one. We see no obvious error, and we shall assume that U.S. participation was sufficient to validate Hensel's foreign search argument. We need not decide this factually based issue definitively, however, for a determination against the government does not change the ultimate result.

2. Next, we must consider whether the search violated any privacy right of Hensel that the Fourth Amendment protects. We believe not. Of course, the search was warrentless--a fact that might ordinarily make it "unreasonable" if it had violated a citizen's reasonable expectations of privacy. See, e.g., Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Miller, 589 F.2d at 1124; Harv. Note, supra, at 727-28.

But there are exceptions to the warrant requirment. When this case was tried in 1981, this circuit recognized an exception for searches on the high seas based on "probable cause." See United Sates v. Hilton, 619 F.2d at 131. Later, in 1982, we held that "reasonable suspicion" was sufficient to allow a high seas Coast Guard search. See United States v. Green, 671 F.2d at 53. The district court, following Hilton's stricter standard, held that the Coast Guard had probable cause to belive that those aboard the PATRICIA were conspiring to smuggle contraband into the United States and that they carried contraband aboard the ship. The court wrote:

> [T]he record in the present case more than adequately supports the conclusion that the Coast Guard had probable cause to

belive that those aboard the PATRICIA were engaged in a conspiracy to smuggle contraband into the United States and that there was contraband aboard the vessel.

For several days the crew of the O'HARA boat had seen the PATRICIA lying idly with no apparent purpose in the Gulf of Maine just outside United States waters, with one white man and several black men on board. An EPIC check disclosed that two of the land line telephone numbers which the white man requested the O'HARA captain to call were listed to suspected drug smugglers and suggested a possible connection between the PATRICIA and a suspected drug offloading site in Maine. An EPIC check further revealed that a vessel named

PATRICIA was suspected of drug smuggling. The PATRICIA had no fishing gear or nets on deck, yet sat low in the water. The only indentification was the name PATRICIA on the bridgewing. The vessel did not fly the flag of any country until approached by the LOUSISBOURG and the RELIANCE, at which time it raised an Honduran flag. The PATRICIA carried sophisticated electronic and radar equipment. When the first Coast Guard plane arrived, the vessel got underway and fled, although the white man had reported to the O'HARA boat that she was disabled and in need of assistance. During the ensuing pursuit, the PATRICIA continuously refused to identify herself, to stop, or to deviate

> from her northeasterly course, despite repeated attempts by the Coast Guard to communicate with the vessel by radio, message block, smoke floats, flag hoists and loud hailer. During the entire night the PATRICIA was under observation, the vessel was operating without navigational lights, steering an erratic course toward the open sea. Only after the RCMP aboard the LOUSIBOURG opened gunfire did the PATRICIA finally come to a stop. These facts add up to ample probable cause for the Coast Guard to believe that the PATRICIA was engaged in a conspiracy to smuggle contraband into the United States.

United States v. Hensel, 509 F. Supp. 1364, 1374 (D. Me. 1981). The district court's finding of probable cause is

fully supported by the evidence.

3. Finally, we consider Hensel's claim that the evidence must be excluded because, whether or not there was "probable cause", the search exceeded the Coast Guard's statutory authority (and violated its regulations). He claims that the only statute that could have authorized the search is 14 U.S.C. § 89(a), which states:

> The Coast Guard may make . . . searches, seizures and arrests upon the high seas . . . for the prevention, detection and suppression of violations of laws of the United States. For such purposes [Coast Guard] . . . officers may . . . go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United

States . . . and search the vessel

. . . .

Hensel believes that this statute does not authorize searches that violate international law and that the search of a foreign vessel without the flag state's permission is such a violation of international law. Therefore, Hensel argues that the search at bar was not authorized by statute, that it is therefore an "unreasonable search" within the terms of the Fourth Amendment, and that consequently its fruits should be suppressed.

This claim is best analyzed in terms of three separate questions: (a) Does the relevant statute authorize searches that violate international law? (b) If not, did this search violate international law? (c) If so, does the "exclusionary rule" require suppression of the evidence?

(a) We agree that § 89(a) does not authorize searches that violate international law. The rule is well established, at least since the time of Chief Justice John Marshall, that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . ." Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); see e.g., Weinberger v. Rossi, 50 U.S.L.W. 4354, 4355 (1982); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Note, "Smoke on the Water": Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone, 13 N.Y.U. J. Int'l L. & Pol. 249, 284-85, 295 (1980) [hereinafter cited as N.Y.U. Note]. Moreover, the legislative history of § 89(a) does not

suggest that Congress intended to violate this principle. Section 89(a) was enacted in response to a Supreme Court opinion holding that the Coast Guard could seize American ships on the high seas to enforce revenue laws, but implying that it could not do so to enforce other laws. See Maul v. United States, 274 U.S. 501 (1927); H.R. Rep. No. 2452, 74th Cong., 2d Sess. 2 (1936). Justices Brandeis and Holmes, concurring in Maul, disagreed with the majority opinion's implication, for they believed the Coast Guard should be able to seize American ships on the high seas to enforce any American law. They assumed, however, that Congress would conform with general principes of international law--principles which did not "confer the general authority to seize foreign vessels upon the high seas." Maul v. United States,

274 U.S. at 523 & n.26 (Brandeis & Holmes, J.J., concurring). Congress took note of the opinon of Justices Brandeis and Holmes, and sought to enact the Brandeis/Holmes concurrence. See H.R. Rep. No. 2452, 74th Cong., 2d Sess. 1-3 (1936); S. Rep. No. 2211, 74th Cong., 2d Sess. 1-3 (1936). Congress wished to authorize the search of vessels on the high seas to the extent such searches conformed to international law, but there is no indication that it wished to go further.

(b) We next consider whether the search violated international law--a difficult question. Despite the implications of Fifth Circuit dicta to the contrary, see United States v. Williams, 617 F.2d 1063, 1076 (5th Cir. 1980) (en banc) (§ 89(a) allows high seas searches of foreign vessels without flag state

permission, provided reasonable suspicion exists); Harv. Note, supra, at 727 n.11, international law does not allow one nation to search on the high seas vessels belonging to another except in very special circumstances. As a fundamental rule, the proposition "that a merchant ship flying the flag of a recognied State is immune from all interference on the high seas by the ships of any other than her own State" is widely accepted. C. Colombos, The International Law of the Sea 311 (6th Ed. 1967); see The Sagatind, 4 F. 2d 928, 931 (S.D.N.Y. 1925) (A. Hand, J.); H. Smith, The Law and Custom of the Sea 64-65 (3d ed. 1959); Harv. Note, supra, at 727 n.11. As stated in the Convention on the High Seas:

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for

> in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.

Convention on the High Seas art. 6(1), opened for signature April 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962). This statement embodies the principle of "freedom of the seas," the principle for which we fought the War of 1812.

The Convention on the High Seas apparently allows only narrow exceptions to this rule of freedom of navigation, for the Convention itself states that the exceptions will be "provided for in international treaties or in these articles." Commentators agree: "even suspicious conduct will not justify active interference [with a foreign

merchant vessel on the high seas in peacetime] except in those cases, such as slave trading, where it is authorized by treaty." H. Smith, supra, at 64-65; accord, e.g., C. Colombos, supra, at 310-15; N.Y.U. Note, supra, at 276 & n.107; Note, Free Navigation: Examination of Recent Actions of the United States Coast Guard,, 13 Vand. J. Transnat'l L.141, 144-45 (1980) [hereinafter cited as Vand.Note].

Thus, the Convention states that we should look to a treaty--in this case the Convention on the High Seas itself--to determine whether a search violates international law. The Convention, as interpreted in light of recognized principles of international law, provided several exceptions. It allows the ship of one state to search another's ship on the high seas when those on the

searching ship suspect the foreign ship of piracy, suspect the ship of engaging in the slave trade, suspect that the ship despite the foreign flag is a domestic ship, are engaged in hot pursuit, or have obtained the permission of the flag state. See Convention on the High Seas, supra, arts. 14-23; H. Smith, supra, at 65-70; Vand. Note, supra, at 144-47. The Convention may also allow searches in cases where those on the searching ship believe that the foreign ship threatens the security of their own nation. See Vand. Note, supra, at 146 n.19; cf. H. Smith, supra, at 70-71. Arguably, three of these exceptions apply here.

First, the Coast Guard may have had reason to believe that the PATRICIA was either a domestic ship or a state-nation may assert jurisdiction. See Smith, supra, at 64-65; Vand. Note,

supra, at 156. The PATRICIA, after all, sailed for a considerable time with no flag despite numerous attempts to communicate with it, and it hauled up its Honduran flag only at the eleventh hour.

Second, the Coast Guard arguably searched the ship with Honduras' consent. Given the need for speedy action, the hostility shown by all nations including Honduras to the international drug trade, see Restatement (Revised) of Foreign Relations § 34 note 2 (1965) ("universal condemnation" of drug traffic), and the fact that Honduras apparently did not protest the seizure, Honduras may arguably be said to have ratified the search. Cf. United States v. Dominguez, 604 F.2d 304, 308 (4th Cir. 1979) (where Bahamas government's confirmation of its permission to seize ship

referred to wrong registration number but where Bahamas government did not protest seizure of ship, defendant cannot contest validity of permission), cert. denied sub nom. Sarmiento v. United States, 444 U.S. 1014 (1980).

Although Coast Guard regulations specifically require its units to obtain the permission of the Coast Guard Commandant before searching foreign vessels on the high seas, see Commandant Instruction No. 16244.1 (1978), and although the Commandant generally grants permission only after the foreign state has consented to the search, a violation of this regulation does not automatically constitute a violation of international law.

Third, some authorities suggest that coastal nations have a right to search hovering vessels up to a "reason-

able" distance from shore where serious crime is at issue, even if that search extends beyond the state's territorial waters or contiguous zone. See Brown, Protective Jurisdiction 34 Am. J. Int'l L. 112, 114 (1940) ("Questions concerning the extent of the zone of protective jurisdiction . . . can only be answered by the rule of reason in each individual case."); Comment to Draft of Convention on the Law of Territorial Waters, art. 20, 23 Am. J. Int'l L. Spec. Supp. 334, 335 (1929) (zone where search is allowed "is determined not by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high seas"); see also Church v. Hubbard, 6 U.S. (2 Cranch) 187, 234-35 (1804); The Panama, 6 F.2d 326, 327 (S.D. Tex. 1925); The Rosalie M., 4 F.2d

815, 816 (S.D. Tex. 1925), aff'd on other grounds, 12 F.2d 970 (5th Cir. 1926); The Grace and Ruby, 283 F. 475, 478 (D. Mass. 1922); Dickenson, Jurisdiction at the Maritime Frontier, 40 Harv. L. Rev. 1, 21-22 (1926). Such a flexible interpretation of a nation's "protective jurisdiction" see Brown, supra, conceivably fits within the exception to the free navigation principle related to "national security"--a provision arguably implicit in the High Seas Convention. CF. H. Smith, supra, at 70-71; Vand. Note, supra, at 145-46 & n.19. Although we recognize that a provision for Coast Guard Searches up to sixty-two mniles from shore proved highly controversial during prohibition, see Ficken, The 1935 Anti-Smuggling Act Aplied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International

Law, 29 U. Miami L. Rev. 700, 709-11 & nn.35-36 (1975), because the antipathy to international drug traffic is more widespread than was the antipathy to the liquor trade, see id. at 720-21, and because the use of hovering "mother ships" has become so common, the reasonableness of searches beyond the contiguous zone may now be more widely accepted. See Restatement (Revised) of Foreign Relations § 522(2)(a) & comment c (Tent. Draft No. 3, 1982) (search but not seizure of narcotics smuggling ship permitted).

The application of the first two of these posible exceptions to this case, however, would involve factually based determinations not made by the district court, and to apply the third would require a difficult exploration of the murky waters of international law.

Rather than remand the case or conduct that exploration, we shall assume for the sake of argument that the exceptions do not apply, and that the search therefore exceeded the bounds of § 89(a). We shall also assume that the Coast Guard failed to comply with its regulation requiring Honduras' advance permission. For, as discussed below, even under these assumptions we believe the evidence was properly admitted.

(c) We turn then to the final question: assuming that the search violated international law and therefore was not authorized by § 89(a), and assuming that it also violated the Coast Guard's "advance permission" regulation, does the "exclusionary rule" require suppression of its fruits? We think not. The Supreme Court has held that lack of statutory authority and the

contravention of a regulation do not automatically invoke the exclusionary rule. See United States v. Caceres, 440 U.S. 741, 755 (1979) ("we decline to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of these rules"); United States v. Giordano, 416 U.S. 505, 524-29 (1974); see also 1 W. LaFave, Search and Seizure § 1.3(b) (1978). The exclusionary rule was not fashioned to vindicate a broad, general right to be free of agency action not "authorized" by law, but rather to protect certain specific, constitutionally protected rights of individuals. Were this not so, courts might have to suppress, for example, information that an agency such as the FCC (or Department of Labor) gathers in a Community Antenna Television regulatory proceeding (or a

Fair Labor Standards Act proceeding) that later turns out to have been beyond the agency's statutory authority. Cf. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (FCC's authority over CATV "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting"); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) (construing scope of administrative authority under FLSA). Yet, the fact that an agency's employees may exceed the scope of a statute's or a regulation's authority does not automatically make their actions "unreasonable" either in Fourth Amendment terms or as a matter of ordinary understanding of reasonableness. Thus, it is not surprising that the Supreme Court in Caceres

denied any such principle of automatic exclusion.

On the other hand, courts have found strong reason to apply the exclusionary rule if an agency gathered information "in direct violation of the constitutional rights of the defendant . . ." Weeks v. United States, 232 U.S. 383, 398 (1914). But, in this case the search violated none of Hensel's constituionally protected interests. For reasons previously stated, see pp. 15-17 infra, the searchdidnot invade Hensel's Fourth Amendment privacy interests, for the searchwassupported by "probable cause." Hensel is wrong in suggesting United States v. Ramsey, 431 U.S. 606 (1977), holds to the contrary, for Ramsey supports the notion that a court must analyze the statute or regulation involved in terms of the interests protected

bythat statute or regulation before deciding whether to invoke the exclusionary rule. In this case, the statute and regulation arguably violated (insofar as they incorporate principles of international law) were designed not to protect the privacy rights of ship captains, but rather to protect the rights of foreign sovereigns. In such a situation, we find the Fifth Circuit's conclusion in United States v. Cadena, 585 F2d 1252, 1261 (5th Cir. 1978), directly on point: "[T]here is no basis for concluding that violation of these international principles must or should be remedied by application of the exclusionary rule or by dismissal of the indictment unless Fourth Amendment interests are violated." Accordingly, we reject the argument that the Coast Guard's violation of the statute and regulation in this case requires us to

apply the exclusionary rule.

A related way to reach the same conclusion is to say that Hensel lacks "standing." That is, Hensel is not entitled to invoke the exclusionary rule on his own behalf, for any violation of international law invaded not his rights but rather the rights of Honduras. The rule of international law in the case at bar is a rule designed to secure peace among nations, not to protect the privacy of individuals. As one commentator wrote, the principle of freedom of the seas "does not protect the smuggler, but it forbids the claim, generally, to jurisdiction on the high seas . . . ." W. Masterson, Jurisdiction in Marginal Seas with special Reference to Smuggling 383-84 (1929); see McDougal & Burke, Crises in the Law of the Sea: Community Perspectives versus National Egoism, 67

Yale L. J. 539, 539 (1958) ("The historic function of the international law of the sea has long been recognized as that of achieving an appropriate balance between the special exlcusive demands of coastal states, and other special claimants, and the general inclusive demands of all other states in the world arena."). Even if international law gives Hensel as captain a right to sue for damages suffered during an illegal search, see The Marianna Flora, 24 U.S. (Wheat.) 1, 42 (1826); The Convention on the High Seas, supra, art. 22(3); Restatement (Revised) of Foreign Relations § 522(4) (Tent. Draft No. 3, 1982) (damages awardable if suspicions of narcotics traffic prove unfounded), this compensation rightderives from the sovereign's right to obtain redress for damages suffered, for "rights under international common

law must belong to sovereign nations, not to individuals..." United States v. Williams, 617 F.2d at 1090. In brief, international law protects Honduras, not Hensel. And Honduras, as far as this record reveals, does not care.

The Supreme Court has made clear that a defendant cannot invoke even the privacy interests of a third party in order to complain of an unlawful search, United States v. Payner, 447 U.S. 727, 731 (1980). Thus, Hensel cannot invoke the interests of Honduras, especially since Honduras' interests are not privacy interests, are waivable, and have not been asserted by Honduras. See also Rakas v. Illinois, 439 U.S. 128 (1978); Alderman v. United States, 394 U.S. 165 (1969).

In sum, whether or not Canadian law authorized the seizure, whether or

not there was sufficient evidence of a "joint venture" to invoke constitutional protections, and whether or not the seizure was unlawful under international law, the evidence against Hensel was properly admitted.

III

Hensel's Hearsay Argument

We turn next to a minor matter, and Hensel's only additional argument for reversal. Hensel claims that the trial court erred in admitting into evidence a glass found at the Turkey Cover property. The glass had on it the word "Dink," Hensel's nickname, and tended to tie Hensel to those at Turkey Cove. As admitted to show this relation, Hensel states, the glass was heresay.

We are tempted to say any error was "harmless" as to Hensel, see, e.g., United States v. Honneus, 508 F.2d 566,

572-73 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975), but we need not do so, for the glass was properly admitted. The fact that the word "Dink" appears on the glass does not itself make the glass hearsay evidence, for no assertion intended by the act of putting the word on the glass was relevant to the chain of inferences the government wished the jury to draw. The jury was not asked to infer anything about the person who put the name on the glass, who for all we know or care works in a factory that turns out "name" glasses by the score. Rather, the jury was asked to infer that Dink Hensel was likely to have possessed a glass with the name "Dink" on it and that he, or someone he knew, placed it in the house at Turkey Cove. The First of these inferences is merely circumstantial. There is no obvious way it depends upon

the statement or state of mind of any out-of-court declarant.

The second of these inferences could involve hearsay only if one accepts a highly complex line of argument: Hensel might claim that he would like to cross-examine the "unknown" person who brought the glass to Turkey Cove on the ground that this out-of-court person's state of mind is relevant to the validity of the second inference. In order to invoke the hearsay rule, Hensel would have to argue that this individual's "nonverbal conduct" in placing the glass in the house was "intended by him as an assertion," Fed. R. Evid. 801(a)(2), that "Hensel was here." Even were one to make the heroic assumption that this was Hensel's argument, it fails. It fails because Hensel did not preliminarily show the district judge that placing the glass

in the house was intended as an "assertion" (e.g., that it was designed to "frame" Hensel). Yet, the Federal Rules of Evidence" place the burden [of proving such an assertive intent] upon the party claiming that the intention existed." Fed. R. Evid. 801 Advisory Committee note (a). Hence, the glass was not shown to be hearsay and it was properly admitted.

IV

The Other Defendants' "Search and Seizure" Issue

Defendants Case, Duke, Hubbard, and Standley challenge the admission of all evidence the government obtained as a result of Agent Cunniff's observation of the license number of the jeep on Lot No. 3 on June 3. This license number was a key piece of evidence. It showed that the jeep belonged to Wells whose telephone number Hensel had given to the

O'HARA prior to the Coast Guard chase. Thus, the license number helped link the ship to the defendants on shore, and much subsequently obtained evidence is arguably a "fruit" of its observation.

For purposes of this appeal we accept the district court's findings, for they are adequately supported in the record. Agents Cunniff and Sinclair walked along to the public beach and waded through waist-high water to observe the dock on Lot No. 3 where they thought a ship carrying drugs was about to dock. The agents apparantely believed that the only way back to civilization without braving the deep water lay through Lot No. 3. Accordingly, they crossed the lot to return to the public access road, and along their way saw the jeep in the driveway and noted the license number. Under these circumstances, the agents may

have had a legal right to pass through Lot No. 3. See, e.g., Ploof v. Putnam, 71 A. 188 (Vt. 1908). Even if we assume they were trepassers, however, we believe they did not violate any of the defendants' Fourth Amendment rights.

To show that their constitutional rights were violated, defendants must show that they had a "legitimate expectation of privacy" in the license number of the jeep parked in the driveway. See, e.g., Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); United States v. Salvucci, 448 U.S 83, 91-92 (1980); Rakas v. Illinois, 439 U.S. at 149. The district court found no such legitimate expectation, given that a license plate is an item normally revealed to the public and that this license plate was observed in a place where the owner could not reasonably have expected it to remain

hidden. United States v. Hensel, 509 F. Supp. at 1386.

The fact that the plate itself is designed for public exposure, while relevant, see United States v. Humphries, 636 F.2d 1172, 1179 n.12 (9th Cir. 1980), cert denied, 451 U.S. 988 (1981), is not determinative. It would not, for example, justify the search of a bedroom if the plate were hidden in the mattress. Thus, we have examined the record, including the aerial photographs, with some care to determine the nature of the place where the jeep was parked.

The testimonial descriptions and the photographs suggest that the driveway to Lot No. 3 is not quite so nestled in the "middle of nowhere" as defendants would have us believe. Rather, they indicate that houses and arms are scattered every few hundred yards along the

highway, and that other residents have built cabins along the coast. The public highway runs within one-quarter to one-half mile of the buildings on Lot No. 3 and three-quarters of the distance from the building to the highway is spanned by a semi-public road--a subdivision road that was open to people other than the owners or users of Lot No. 3. The record contains testimony that members of the public generally considered the beach open to their use for clamming and "gunning," and that they used the wooded area for hauling wood and fishing. On the other hand, there were "no trespassing" signs and there was a chain across the drive (although the government produced testimony that the chain and all but one sign first appeared after June 3). In any event, taken together, the evidence could lead the district court

reasonably to conclude that the defendants should have expected that a license plate on a jeep parked on their driveway --apparently only one or two hundred yards from a subdivision road, and squarely between that road and a beach used at least sometimes by clammers, hunters and others--would not remain hidden from the occasional passerby.

We have also reviewed the case law on the subject. This case seems a less compelling one for defendants than many other cases in which similar searches were upheld. See United States v.Lace, 669 F.2d 46 (2d Cir. 1982) (surveillance of 70-acre Vermont farm by agents who entered the farm in military camoflouge uniforms and maintained round-the-clock surveillance with such equipment as nightscopes, 130-power Questarlens, and infra-red goggles);

United States v. Ramapuram, 632 F.2d 1149 (4th Cir. 1980) (search of trunk of junk car abandoned on farm owned by defendant's father, where agents were able to reach car only by driving 200 yards down private road and then walking by foot across open field), cert. denied, 450 U.S. 1030 (1981); see also United States v. Edmonds, 611 F.2d 1386 (5th Cir. 1980) (search of private dock area upheld, where public generally considered it open to public); United States v. Humphries, 636 F.2d 1172, 1178-79 (9th Cir. 1980) (evidence obtained as a result of an agent's entrance onto private driveway to observe license number of parked car), cert. denied, 451 U.S. 988 (1981).

We have been unable to find any case in which courts have accepted claims similar to that of defendants. And, the

cases they have cited are distinguishable. See United States v. Oliver, 657 F.2d 85 (6th Cir. 1981) (search unconstitutional where agents passed many "No Trespassing" signs and locked gate along private road, and were told to leave premises); Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974) (search unconstitutional where agents searched shaving kit hidden in backyard); United States v. Davis, 423 F.2d 974 (5th Cir.) (search unconstitutional where agents made warrantless search of defendant's yard and seized pistol), cert. denied, 400 U.S. 836 (1970); Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968) (search unconstitutional where agents searched pile of trees next to lodge and seized nine trees as evidence); Sanders v. State, 264 Ark. 433, 572 S.W.2d 397 (1978) (observation of garden located

behind home and separated by fence from home impermissible); Norman v. State, 134 Ga. App. 767, 216 S.E.2d 644 (1975) (search unconstitutional where agents searched truck located behind barn behind house); State v. Kendler, 588 P. 2d 447, 60 Hawaii 301 (1978) (observation unconstitutional where officer climbed fence to observe plants hidden behind dense, tall vegatation in defendant's backyard).

Given the facts and case law, we believe the decision of the district court on this issue was correct.

V

The Sufficiency of the Evidence

Each defendant, with the exception of Hensel and Duke, argues that the evidence against him was insufficient for conviction. On appeal, our task is to "consider the evidence as a whole, taken in the light most favorable to the

Government, together with all legitimate inferences to be drawn therefrom, to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt." United States v. Patterson, 644 F.2d 890, 893 (1st Cir. 1981); see United States v. Doran, 483 F.2d 369, 372 (1st Cir. 1973), cert. denied, 416 U.S. 906 (1974); Parker v. United States, 378 F.2d 641, 644 (1st Cir.), cert. denied, 389 U.S. 842 (1967). To convince the defendants of conspiring to import marijuana into the United States, the government bore the burden of proving that each defendant knowingly and intentionally joined that conspiracy. See Direct Sales Co., v. United States, 319 U.S. 703, 709 (1943); United States v. Izzi, 613 F.2d 1205, 1210 (1st Cir.), cert denied, 446 U.S. 940 (1980); United States v. Mora, 598 F.2d 682 and 683 (1st

Cir. 1979) ("the gist of conspiracy is an 'agreement to disobey or to disregard the law'"). But, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development or collection of circumstances.'" United States v. Stubbert, 655 F.2d 453, 456 (1st Cir. 1981), quoting Glasser v. United States, 315 U.S. 60, 80 (1942). We apply these standards first to the strongest defense claims--those of Standley, Hubbard and Case. We then turn to defendants Wells and Dill.

A

Standley, Hubbard, and Case

1. Standley, Hubbard and Case are three carpenters who moved to Maine and worked on the Turkey Cove property. We suspect the sufficiency of the evidence against them turns on the

proper use of two key pieces of evidence: a "preparation" and "clean up" list (Government Exhibit 110), and a payroll list (Government Exhibit 111), both of which government agents found in the bedroom where defendant Duke was working at the time of his arrest. Government Exhibit 110 consists of a yellow pad which includes: 1) a page entitled "Clean Up Crew 20 Minutes"" that contains suggestions of things to be done to move the "bales" from the boat to the boat house and van, and lists fourteen names including "Bobby" and "Flip" (see Appendix I); 2) nineteen pages headed "Master List," with numbers one through 950 in columns and a heading "Total per col.--wt" at the bottom of each column; 3) a page headed "Wet Ones List;" 4) a page listing "Total Gross Weight" and "Total Net" by truck; and 5) a page headed

"Preparation Group 9:00 Dark" which lists six names including "Charlie," and "Bobby" (see Appendix II). Since independent evidence indicated that defendant Case was know as "Flip," and since the jury could reasonably infer that Charles Standley was known as "Charlie" and Robert Hubbard as "Bobby," these lists linked these men to the conspiracy. Government Exhibit 111 incudes five separate pages marked A through E. One page, entitled "Pay Schedule," lists 24 names, including "Flip." Government Exhibit 111 does not refer to "Charlie" or "Bobby."

When the government initially offered the preparation, clean up, and payroll lists into evidence, the defendants objeted to them as hearsay. The government invoked the "co-conspirator" exception, see Fed. R. Evid. 801(d) (2)

(E), but also stated that it offered the lists not for the truth of the matter they asserted, but rather to allow the jury to infer that those named on the list were associated with the conspiracy from the fact that these lists were found in the bedroom when government agents entered the house. When arrested, Duke was writing on the payroll list (Government Exhibit 111) and the other list (Government Exhibit 110) was nearby. Cash ($2,000) was lying on Duke's desk, and a briefcase with $44,000 was on the bed nearby. The government believed the jury could circumstantially infer an association from these facts. The trial court, faced with the defendants' hearsay objection to the lists, told the jury when the exhibits were entered: "These papers are not admitted to show the truth of the statements made in them. You, as

the jury, may not consider them as providing any evidence that the contents of these papers are accurate or true."

Later during the trial, the court made the preliminary findings of a likely conspiracy required by United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977) and United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir.), cert. denied, 449 U.S 956 (1980), and it concluded that the statements were admissible hearsay under the co-conspirator exception to the hearsay rule. See Fed. R. Evid. 801(d)(2)(E). When the court decided to remove the limiting instruction, however, the defendants claimed that they were prejudiced by this ruling on the grounds that they had relied upon the government's statement that it would not use the lists to prove the truth of the assertions they contained. Accord-

ingly, the court rescinded this ruling. On the following day, the court heard argument on the purposes for which the government could use the lists. The government argued:

> We are not asserting that it in fact takes 20 minutes for the clean up crew to operate. We are not asserting that in fact "Flip" has the key. However, we are asserting that the fact that Mr. Duke was writing on one of the exhibits and the other was in close proximity with him at the time is an act of a co-conspirator from which the jury may draw certain inferences about the purpose of the act and the scheme included in it.

The court granted the government's motion to allow the use of the lists for the

following purposes:

> [t]he exhibits do not constitute statements admitted for the truth of any assertion contained in them but that if the Jury finds that the Defendant Duke was writing on these exhibits at the time Special Agent Cunniff encountered Duke and that Defendant Duke was in custody and control of the exhibits at that time, the Jury may consider these two exhibits as circumstantial evidence from which you may draw inferences about the relationship among the various parties and items for plan, purpose, preparation and knowledge.

The judge himself gave no instructions to the jury concerning the use of the lists. However, during closing argument the government told the jury:

You will recall that the Judge instructed you that these documents have not been admitted for the truth of the statements that are contained thereon . . . . You know, however, that at the time Mr. Cunniff went to the upstairs bedroom and encountered Mr. Duke that Mr. Duke was writing on Government Exhibit 111, the white paper, and also that he had $44,000 with him in a brief case and in cash. From those facts, Ladies and Gentlemen, you may consider Government Exhibits 110 and 111 as circumstantial evidence from which you may draw certain inferences about the relationship among the parties listed in those lists and inferences about the plan, purpose, preparation and knowledge of the

people involved in this conspiracy. Defense counsel moved for a mistrial on the basis of this argument, but the court denied the motion.

We believe the court's ruling was proper. The jury was not permitted to infer Standley, Hubbard, and Case's participation from the out-of-court written assertion by the maker of the list that the three were participants in the conspiracy. The jury was permitted to infer their participation from the fact that one actively involved in the conspiracy, namely Duke, possessed a participant's list on which their names were found. We recognize that inferring participation from the juxtaposition of the fact that Duke possessed lists containing their names with the fact that Duke himself was actively involved in the conspiracy may involve a use of the lists

for a purpose closely related to hearsay. See generally 4. J. Weinstein & M. Berger, Weinstein's Evidence 801-53 to 801-57 (1979). After all, the validity of making the inference 'that a defendant participated' from the fact "that Duke possessed a list with defendant's name depends in part upon Duke's state of mind in possessing the list. The inference is based, first, on the assumption that Duke believed the three were participants, and second, on the assumption that Duke's beliefs regarding the membership of the conspiracy were, in the context of the totality of the evidence, likely to be correct.

Nevertheless, even if the jury's inference involved a hearsay-type of problem, the evidence was outside the scope of hearsay as defined by the Federal Rules of Evidence. See Fed. R.

Evid. 801-806. The court allowed the jury to infer plan, purpose, preparation, knowledge, and association from Duke's possession of the list. Possession is conduct, and conduct is hearsay under the Federal Rules only if "intended . . . as an assertion." Fed. R. Evid. 801(a)(2). We do not see how Duke's possession of the list could have been "intended . . . as an assertion" of the defendants' role unless Duke had been staging an elaborate charade to implicate the defendants. If defendants believed that to be the case, however, they bore the burden of proving that the conduct was indeed intended as an assertion, see Fed. R. Evid. 801 Advisory Committee note (a); 4 J. Weinstein & M. Berger, supra, at 801-62 to 801-63, and they offered no such proof. Similar evidence has been admitted as circumstantial evidence in

other cases. See e.g., United States v. Marino, 658 F.2d 1120, 1124 (6th Cir. 1981); United States v. Marino, 658 F.2d 1120, 1124 (6th Cir. 1981); United States v. Mazyak, 650 F.2d 788, 792 (5th Cir. 1981), cert. denied, 102 S. Ct. 1281 (1982); United States v. Day, 591 F.2d 861, 883 (D.C. Cir. 1978); United States v. Ruiz, 477 F.2d 918, 919 (2d Cir.) (per curiam), cert. denied), 414 U.S. 1004 (1973); United States v. Canieso, 470 F.2d 1224, 1232-33 (2d Cir. 1972). And, in any event, this use would both fit within the "co-conspirator" hearsay exception, Fed. Fed. R. Evid. 801(d)(2)(E) (as the district court properly found to apply), and would have come as no surprise to defendants.

Thus, we believe the jury could properly have used the lists as evidence that Duke beieved Standley, Hubbard and

Case were in the conspiracy and, hence, given Duke's central role, as evidence that they were, in fact, conspirators.

2. In addition to their first names being on the lists found in Duke's possession, there was other evidence from which the jury could infer that Standley, Hubbard, and Case knowingly and intentionally participated in the conspiracy. The jury could have believed that Hubbard, Case, and Standley were Georgia residents. It could conclude that the three were carpenters who had come to work on the Turkey Cove property in Maine during the time that the con spiricy was in operation. It could have inferred that they built shutters that fit on the inside of the boathouse windows to hide the marijuana that would be stored there. And it could have inferred that they saw the conveyor

belt, the elaborate radio and communications equipment, the industrial vacuum cleaner, the vans, and the navigational charts--all of which were present on the Turkey Cove property.

We believe that a jury could reasonably find that Standley was a member of the conspiracy from the evidence regarding Standley's occupation, the likelihood that the carpentry work was in fact to be used to further a drug-smuggling conspiracy, the evidence that Standley was not from Maine, the fact that items like sophisticated radios, conveyor belts and industrial vacuum cleaners were likely to be seen by one working at Turkey Cove, and Duke's possession of a "preparation" and "clean up" list mentioning Standley. This case is unlike the cases reversing convictions where the evidence consisted of little

more than mere presence at the scene of the crime. See, e.g., United States v. Mora, 598 F.2d 682 (1st Cir. 1979) (conviction reversed where defendant had traveled with woman carrying cocaine, but where there was no evidence that defendant knew woman carried drugs or that he had known her before trip); United States v. Mehtala, 578 F.2d 6(1st Cir. 1978) (conviction reversed where only evidence against defendant was proof of her presence on ship containing drugs and evidence of a close relationship with captain during voyage, and where there was no evidence that defendant had embarked on voyage for any purpose other than pleasure and no indication of prior association with captain); United States v. Francomano, 554 F.2d 483 (1st Cir. 1977) (conviction reversed where defendants worked on ship carrying drugs, but

where there was no evidence that they knew drugs were aboard and where there was evidence that they had sought passage on other ships and were sailing for sake of adventure). The presence of other incriminating evidence in this case makes it considerably more like United States v. Irizarry, 673 F.2d 554 (1st Cir. 1982) (conviction for aiding and abetting affirmed where defendant was present in hotel room with others, where agents saw one of the party take a gun out of a handbag, and where agents later found that gun and two others as well as marijuana hidden in ceiling and found marijuana in ashtray and bathtub.

If the evidence is sufficient to convict Standley, it is also sufficient to convict Hubbard, since virtually all the evidence against Standley was available against Hubbard. In addition,

Hubbard was arrested while leaving the Turkey Cove property in Wells' tan jeep with Case and was described as having slouched down in his seat when the police agent approached. In the jeep, the police found elaborate radio equipment, books explaining how to monitor police radio frequencies, a navigational chart showing the course of a ship (which the jury could reasonably have believed was the PATRICIA) from Florida to the Gulf of Maine; navigational equipment; Duke's passport together with a luggage tag with Duke's name and address; photographs and an airline ticket for Standley; and a car rental contract and Howard Johnsons' receipt in Wells' name. When arrested, Hubbard had various slips of paper in his pocket with the first names or nicknames and telephone numbers of various co-defendants, as well as a slip of paper

mentioning radios and rollers--items which the jury could reasonably conclude were used to guide and unload the PATRICIA. As noted at p. 8, supra, defendant Dill bought the SUNSHINE and the boat's radio equipment in Hubbard's name.

Similarly, the evidence against Standley and Hubbard was available against Case, whose nickname "Flip" appeared on both Government Exhibit 110 and Government Exhibit 111. Case was the driver of the tan jeep in which he and Hubbard were arrested, and in which the various paraphernalia described above were found. In addition, Case had on his person at the time of his arrest the keys to a large-capacity cargo van registered in Georgia which was found, loaded with radio equipment, at the Ramada Inn in Lewiston, Maine. We therefore find the evidence sufficient to allow the convic-

tion of Standley, Hubbard, and Case.

B

Wells

Wells, too, challenges the sufficiency of the evidence linking him to the conspiracy. However, the jeep in which Case and Hubbard were arrested belonged to Wells. Wells and Hensel were long-time acquaintances, and one of the phone numbers that Hensel aboard the PATRICIA asked the mate of a nearby fishing boat to call was that of Wells. Wells did not live in the Turkey Cove area, but was seen with Duke on the SUNSHINE on May 20, 1980, in Panobscot Bay. On May 28, a John Wells and another person registered at a hotel in Portland, Maine, and calls were made from one of their rooms to the Turkey Cove property. Wells also rented a car, the contract for which was found in the tan jeep. And

Duke had on him at the time of his arrest a book with Wells' name and phone number. This evidence is adequate to allow the jury reasonably to conclude that Wells knowingly and intentionally joined the conspiracy.

C

Dill

Finally, Dill claims that the evidence against him was insufficient. There was, however, considerable evidence linking him to the conspiracy. Dill lived in Georgia until early 1980, when he came to Maine and lived in one hotel after another. He bought a pick-up truck with over $3,000 in cash--from which the jury could reasonably conclude that he hoped to avoid leaving any trace of his transactions. Dill bought the SUNSHINE in Hubbard's name, and then outfitted the boat with radar and radio equipment,

again in Hubbard's name. He paid for the boat and this material with cash and several separate checks. He told inconsistent stories about what he planned to do with the boat. He had the boat repaired--for which he again paid in cash--and was observed using the boat. The boat was moored at the Turkey Cove dock, and DEA agents testified that small boats like the SUNSHINE are often used by drug smugglers to guide to shore larger vessels that carry the contraband. In addition, on March 20, 1980, Dill talked to a realtor about buying the Turkey Cove property (he did not then buy it) and paid special attention to the dock. When Hubbard was arrested, he carried two slips of paper with Dill's name and phone number, and "Craig 300" was written in a notebook found in the back of the jeep. While some of this

evidence by itself may not be highly incriminating, we have no doubt that the jury might reasonably have concluded on the basis of the totality of the evidence that Dill knowingly and intentionally joined the conspiracy.

VI

Other Issues

Various of the defendants raise other arguments which do not require extensive discussion.

A

Defendant Dill argues that the jury could not validly convict him on the basis of his having provided members of a conspiracy with a boat unless it also believed that he knowingly and intentionally agreed to join the conspiracy. Hence, he says, the trial court ought to have adopted his proposed instructions, which emphasized agreement, specific

intent, and criminal knowledge. It is, however, well established that a court need not "deliver a requested instruction verbatim." United States v. Winter, 663 F.2d 1120, 1146 (1st Cir. 1981), app. pending. And we are satisfied that the district judge's instructions were fair, impartial, and complete statements of the law, adequately emphasizing the need to find agreement, knowledge, and intent. The district judge stated, for example,

> But what the law says is that before a jury may find that a defendant has become a member of a conspiracy, the evidence must show beyone a reasonable doubt that the conspiracy was willfully and knowingly formed and that the defendant willfully and knowingly participated in the unlawful plan with the intent to advance or

> further some illegal object or purpose of the conspiracy. In other words, although willful participation in a conspiracy may be established by circumstantial evidence, there must be some evidentiary basis for inferring that the defendant knew about the conspiracy and intended to participate in it and to make it succeed. . . . So if a defendant with understanding of the unlawful character of a plan voluntarily and intentionally encourages, advises or assists for the purpose of furthering the undertaking or scheme, that defendant then becomes a willful and knowing participant in the scheme; in other words, a conspirator.

These instructions were adequate. See

United States v. Irwin, 593 F.2d 138, 140-141 (1st Cir. 1979); United States v. Coast of Maine Lobster Co., 557 F.2d 905, 909 (1st Cir.), cert. denied, 434 .S. 862 (1977). Other requested instructions based on United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940), were inappropriate here.

B

Dill contests the admission of "expert" testimony by Agent Cunniff about the general practices of drug smugglers. The issue is whether the risk of prejudice outweighed the probative value of Cunniff's testimony. See Fed. R. Evid. 403. On the one hand, smuggling tons of marijuana is a complex matter. Agent Cunniff's testimony explained the methods drug smugglers generally use; thus it was testimony that would "assist the trier of fact to understand the

evidence," Fed. R. Evid. 702, and helped the jury determine which alleged facts were material to the charges made against which defendants. On the other hand, Agent Cunniff sat at the prosecutor's table, and much of his testimony concerned behavior, such as making lists and buying boats, in which innocent people commonly engage. Although we recognize the risk of prejudice, the question facing the lower court was one of balance. "[T]he propriety of receiving expert testimony rests within the sound discretion of the trial court." United States v. Fosher, 590 F.2d 381, 382 (1st Cir. 1979). Similar evidence has been admitted in other cases. See, e.g., United States v. Golden, 532 F.2d 1244, 1247-48 (9th Cir.) (per curiam) (DEA agent testifies about the price of drugs), cert. denied sub nom. Trowery v.

United States, 429 U.S. 842 (1976); United States v. Sellaro, 514 F.2d 114, 118-19 (8th Cir. 1973) (FBI agent testifies about bookmaking practices), cert. denied, 421 U.S. 1013 (1975). "Given the broad discretion allowed a trial court in determining the admissibilty of expert testimony," United States v. Fosher, 590 F.2d at 382, as well as the permissive language of Fed. R. Evid. 403, we find no error here.

C

1. Dill argues that the lower court erred in refusing to allow discovery of documents that he believes were essential to the cross-examination of Agent Cunniff. After Agent Cunniff testified on direct examination (about the general habits of drug smugglers and his investigation of Turkey Cove), the defense sought, in the trial judge's

words, "a vast number of DEA manuals, guidelines, reports and memoranda, opinions, rules or regulations issued by the United States Department of Justice, and also by the DEA, all relating to drug smuggling on the coast of Maine and the eastern seaboard of the United States." As the defense conceded, this material did not involve "any documents whatsoever which [were] involved in the investigation of this particular case." The trial judge believed that these documents were not essential to Dill's defense and that, given the timing of the request and the burden it would impose on the government, the request should be denied. Having reviewed the request and the testimony, we agree.

This general conclusion disposes of most of Dill's specific claims that one or another rule or statute

required the district court to allow this discovery. Dill refers to Fed. R. Evid. 705. But, as the district court stated,

> Evidence Rule 705 provides that on cross-examination an expert witness may be required to disclose the underlying facts or data upon which his expert opinion was based. Mr. Cunniff testified that his expert opinion was based upon his prior experience in drug smuggling investigations along the coast of Maine. At no time did he indicate that that opinion was predicated upon the manuals, reports, rules and regulations production of which is here sought.

This statement is correct and dispositive.

Dill refers to Fed. R. Crim P. 16, governing discovery and inspection.

But the district court held that the request under that rule was untimely ("as the defendants were on notice that this testimony would be presented over two weeks ago prior to the start of the trial") and that the defendants had not shown how the documents were "material to the preparation of [their] defense." Rule 16 requests ordinarily must be made before trial. See United States v. Jensen, 608 F.2d 1349, 1357 (10th Cir. 1979); 2 C. Wright, Federal Practice and Procedure § 257 (1982). And Rule 16(a)(1)(c) specifically limits discovery to documents "which are material to the preparation" of the defense. Accordingly, the district court's ruling was well within its power.

Although Dill also refers to Fed. R. Crim. P. 17 governing subpoenas, that rule gives the district court

adequate authority to deny a subpoena where production would be unreasonable. See United States v. Nixon, 418 U.S. 683, 698 (1974). Because the district court found the requested subpoena "far too broad", "untimely," and "harrass[ing]," and since these findings were well within its discretion, see United States v. Lieberman, 608 F.2d 889, 904 (1st Cir. 1979), cert. denied, 444 U.S. 1019 (1980); 2 C. Wright, supra, at § 275, this rule does not help Dill. Moreover, since we believe the district court could reasonably find that the information sought was not "material" or necessary for effective cross-examination of Agent Cunniff, we reject Dill's "witness confrontation" claim under the Sixth Amendment. See Davis v. Alaska, 415 U.S. 308, 318 (1974); Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

Finally, Dill argues the Jencks Act, 18 U.S.C. § 3500, and the Freedom of Information Act, 5 U.S.C. § 552, support his document request. But the defendants argued no FOIA or Jencks Act request to the court below, and they are therefore barred from pursuing those claims here. See United States v. Campa, 679 F.2d 1006, 1011 (1st Cir. 1982); United States v. Carter, 613 F.2d 256, 261 (10th Cir. 1979), cert. denied, 449 U.S. 822 (1980) ("By failing to make a timely motion for the production of the Jencks Act materials as the statute requres, appellants waived any right they may have had to complain on appeal of an alleged lack of governmental production."). There is no special circumstance warranting an exception.

2. Dill argues that the government violated its agreement under

an April 8, 1981, court order to produce all Jencks Act materials at least five days prior to the start of the trial. The claim of violation was not made to the court below, and accordingly is waived.

3. Dill argues (in his reply brief) that the government violated the Jencks Act anew when it discussed testimony Agent Cunniff gave in other trials. However, a "transcript of a witness' testimony in a prior trial does not come within the language of the Jencks Act." United States v. Baker, 358 F.2d 18, 20 (7th Cir.), cert. denied, 385 U.S. 869 (1966); cf. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398 (1959) (grand jury minutes not covered by Jencks Act). Regardless, given the fact that the testimony is part of the public record, the government's failure to

disclose the material would constitute harmless error. See, e.g., United States v. Honneus, 508 F.2d at 572-73.

D

Wells argues that his in-court identification by former Coast Guardsman Anthony Stewart, who had boarded the SUNSHINE when it was in distress on May 20, 1980, violated his Fifth and Sixth Amendment rights. During the trial, Stewart had been called to the courthouse to identify defendants Wells and Duke as the men he saw on the SUNSHINE. While waiting to meet with the U.S. Attorney, Stewart talked with three Coast Guardsmen who were also at the courthouse to identify Wells and Duke. They had already identified the two men from photographs and assured Stewart that it was "easy to pick them out." After the U.S. Attorney had talked with Stewart

about the case, the U. S. Attorney told him, in Stewart's words, to "just look around to see if [he] could pick them out." When Stewart went to the courthouse snack bar later that day, he noticed and identified Wells and Duke. The district judge described the incident as follows:

> The defendant was standing with a group of others, some eight or nine, of whom two may have been women, the others men; all dressed in civilian clothes in the lunch area in the courthouse; and without prompting or suggestion of any type, identified the two individuals in question. . . . [There is no] evidence to support a finding by this Court that the identification occurred as a result of an arranged confrontation . . .

> While it's true that the witness Stewart was requested by the United States Attorney to keep his eyes open as he walked around the courthouse to see whether there was anyone whom he might indentify, there is nothing in the record to support the finding by the Court that the actual confrontation which occurred was in any way prearranged by the United States Attorney's Office.

Wells claims that these circumstances amount to a violation of the Fifth Amendment. We disagree. The Fifth Amendment right to due process protects a defendant against unduly suggestive identification procedures. Thus, the right is invoked in identification situations to prevent "the primary evil" of "a very substantial likelihood of

irreparable misidentification." Neil v. Biggers, 409 U.S. 188, 198 (1972), quoting Simmons v. United States, 390 U.S. 377, 384 (1968); see Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("reliability is the linchpin"). Stewart was not subjected to a suggestive encounter, nor was the incident orchestrated by the government. Neither the comments of the U.S. Attorney nor the comments of the Coast Guardsmen increased the likelihood that Stewart would identify Wells and Duke as the men aboard the SUNSHINE. See United States v. Massaro, 544 F.2d 547, 550-51 (1st Cir. 1976) (chance encounter in courthouse hall), cert. denied, 429 U.S. 1052 (1977). Accordingly, we find no violation of Wells' Fifth Amendment rights.

Wells also claims a violation of the Sixth Amendment. But the Sixth

Amendment right to counsel at identification sessions is designed to protect defendants from suggestiveness or other prejudicial acts that might otherwise tak place. See Moore v. Illinois, 434 U.S. 220, 224 (1977). The right to counsel at an identification session, the Supreme Court explained in United States v. Wade, 388 U. S. 218 227 (1967), depends on "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and [on] the ability of counsel to help avoid that prejudice." See also Gilbert v. California, 388 U.S. 263 (1967). Since Stewart's identification of Wells and Duke was not arranged by the government, since it was not "suggestive," and since it was accidental, "we fail to see any harm resulting from the defense counsel's absence." United States v. Masaro, 544

F.2d at 551 (concerning an accidental identification in the courthouse halls) (opinion by Mr. Justice Clark).

E

Finally, defendants argue that the agents' use of nightscopes, spotting scopes, binoculars, telescopes, and aerial surveillance in observing activities on the Turkey Cove property violated their Fourth Amendment rights. After examining the record, we agree with the government that appellants are foreclosed from raising this issue on appeal by their failure to present it to the court below.

Toward the close of cross-examination of the government agents about their use of optical equipment, the district judge asked the defendants whether they claimed "that any Fourth Amendment rights are violated by the use

of a telescope . . . or a nightscope to observe activity on a dock such as this." Counsel for defendant Duke responded, "No Your Honor. That's not our position." No one disagreed. Later in the suppression proceedings, the judge again asked whether the defendants contended that their Fourth Amendment rights were infringed by "observations made from the [observation post] across the St. George River." The judge stated that he believed that no violation could have occurred unless the sight-enhancing equipmeht permitted the agents to see inside the structures on Lot No. 3, and the defense counsel replied that that was "a correct statement of the law." This was a reasonable position to take, given the case law on the subject. See e.g., United States v. Lee, 274 U.S. 559 (1927) (Brandeis, J.) (approving use of

search lights, marine glasses, and field glasses); United States v. Lace, 669 F.2d 46 (2d Cir. 1982) (approving use of nightscopes, 130-power Questar lens, and infra-red goggles on rural property); United States v. Allen, 633 F.2d 1282, 1289-90 (9th Cir. 1980) (approving use of helicopter surveillance of secluded sea-side ranch where airspace above property was routinely traversed by Coast Guard heicopters), cert. denied, 454 U.S. 833 (1981); United States v. Minton 488 F.2d 37 (4th Cir. 1973) (per curiam) (approving use of binoculars), cert. denied, 416 U.S. 936 (1974). Finally, during oral argument at the closing of the motion to suppress, no defense attorney argued that the officers' use of optical equipment constituted a Fourth Amendment violation. In these circumstances, we think the district court's

finding that the defendants waived this claim, 509 F. Supp. at 1384 n. 9, is supported by the record. See United States v. Campa, 679 F.2d at 1011 (argument not made below will not be considered on appeal absent special circumstances); Langton v. Berman, 667 F.2d 231, 233 (1st Cir. 1981); United States v. Miller, 636 F.2d 850, 853 (1st Cir. 1980) (per curiam).

For the reasons stated above, the convictions returned against the appellants are affirmed.

Clean up Crew 2c minutes

I Kitchen of Dishes and Pots & Pans Boxes from dock and other debris to be unscrewed clean again around 12 Noon. If important leave (R) at Canteen in boat house Refuse all other in garage Quickly! Bring vacuum to boat house - leave here Garage - Yel Side Key To File

After Outside and Dock area are clean everybody inside boat house, about 4 Persons here. Don't clut Rooms or any Single Bunkers If we run out of space in boat house Load White GMC

Yl Berry
Bill Beatty
Richer
Shaun
Bill
Mike
J.A.
Marty
Gary
Rick
Eni

ATTACHMENT II

FRAMETOWN GROUP 9:CC DATA

Charlie
Bill
Guy

Admin. Offices, U.S. Courts — Addison C. Critchfield & Son, Inc.

[JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Entered January 25, 1983 in Case Nos. 81-1538-1540].

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court: Clerk.

[ORDER OF COURT, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, Entered March 9, 1983, in Case No. 81-1540]

Upon consideration of the "Petition for Rehearing and Suggestion for Rehearing En Banc", which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is hereby denied.

By the Court:

Dana H. Gallup, Clerk

By: Francis P. Scigliano

Chief Deputy Clerk

[ORDER OF SUPREME COURT OF THE UNITED STATES, Case No. A-881]

Upon Consideration of the application of counsel for petitioner.

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be and the same is hereby, extended to and including June 7, 1983.

/s/William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the United
States

Dated this 29th day of April, 1983

[PETITIONER'S REQUEST FOR DISCOVERY AT TRIAL (Excerpt of proceedings in the United States District Court for the District of Maine, May 4, 1981)]

* * *

MR. GARLAND: May it please the Court, I would move this Court to have the Government disclose, prior to the completion of cross-examination of this witness before he's finally released as a Government witness and before defense counsel finally cross-examines him, since I understand the Government intends to return him to the stand, the following: The DEA agent's manual, specifically portions related to importation and distribution of marijuana.

Number two, the DEA domestic operation guidelines, specifically those portions related to the importation and distribution of marijuana.

Number three, the DEA summary reports, as well as detailed reports, concerning the drug smuggling cases on the Maine coast that this witness has participated in the investigation of; especially those portions of the report that relate to the use of items such as he has testified to as being typically used in those cases.

Reports including smuggling cases where Michael Cunniff was the agent in charge on the eastern seaboard, especially those in Maine.

In addition, all cases that Mr. Cunniff has been involved in that were related to importation into Canada.

All final opinion, rules and regulations issued by the United States Department of Justice and the DEA relating to investigation of marijuana importation and distribution along the eastern seaboard into the United States and into Maine.

* * *

[UNITED STATES CONSTITUTION

AMENDMENT V (1791)]

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to be . . . informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

[THE JENCKS ACT, 18 U.S.C. §3500]

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the

subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use.

If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic mechanical, electrical, or other recording, or a transcription thereof, which is a sub-

stantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the mak- of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

FEDERAL RULES OF EVIDENCE

RULE 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other

rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.